03-2968

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 03-2968-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES E. YOUNG,

Defendant-Appellant-Petitioner.

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ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN KENOSHA COUNTY, THE HONORABLE MICHAEL S. FISHER, PRESIDING

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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# BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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## ISSUES PRESENTED

I. WHAT IS THE TEST FOR DETERMINING WHEN AND WHETHER A SEIZURE HAS OCCURRED WITHIN THE MEANING OF THE STATE AND FEDERAL CONSTITUTIONS?

The court of appeals concluded that it must analyze the question of when a seizure has occurred according to ***California v. Hodari D.***, 499 U.S. 621

(1991), but urged this court to consider whether the Wisconsin Constitution might warrant a different result.

II. WAS CHARLES YOUNG SEIZED WHEN A POLICE OFFICER STOPPED HIS SQUAD CAR IN THE ROADWAY BEHIND YOUNG'S CAR, PUT ON HIS FLASHING LIGHTS, AND ILLUMINATED A SPOTLIGHT ON THE CAR?

Both the trial court and the court of appeals concluded that Young was not seized at that point in time, but that he was seized when the police tackled him.

III. DID THE POLICE HAVE REASONABLE SUSPICION TO WARRANT SEIZING YOUNG?

The trial court answered affirmatively. The court of appeals questioned, but did not decide, whether the police had reason to suspect criminal activity at the point at which Young was sitting in the car. The court determined that reasonable suspicion did develop later when police subdued Young.

IV. IS THERE SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT YOUNG'S CONVICTION FOR OBSTRUCTING?

The court of appeals raised the issue *sua sponte*, but did not decide it.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

This court's granting of the petition for review indicates that the case is sufficiently important to warrant both oral argument and publication.

## STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered in Kenosha County, the Honorable Michael S. Fisher, presiding.

The state charged the petitioner, Charles Young, in an information with one count of possession of THC, as a second or subsequent offense, contrary to Wis. Stat. § 961.41(3g)(e), one count of resisting an officer, and one count of obstructing an officer, contrary to Wis. Stat. § 946.41(1) (6:1-2).

Young filed a pre-trial motion to suppress evidence (12). The court held a hearing on the motion prior to the commencement of trial (45:1-20). The court denied the motion to suppress, and the jury trial immediately followed (45:20). The jury convicted Young on all three counts (23; 24; 25). The court subsequently sentenced Young to a bifurcated sentence of two years and six months for the THC conviction, and imposed consecutive probation on the remaining counts (30; 31).

Young appealed, and in a decision entered on November 17, 2004, the Wisconsin Court of Appeals, District II, affirmed (App. 101-13). Applying ***California v. Hodari D.***, 499 U.S. 621 (1991), the court held that Young did not submit to the police show of authority when the police detained the vehicle and ordered Young back to the car. (Slip op. at ¶16; App. 107). Instead, Young initially walked away and then ran away. "Given those facts," the court held, "***Hodari D.*** precludes Young from raising his Fourth Amendment claim that [the police] illegally detained the vehicle under ***Terry***." ***Id.***

The court of appeals went on to criticize the decision in ***Hodari D.***, concluding that it renders the supposed right to go on one's way "an empty right because it vests the police with the authority to pursue

and detain anew." (Slip op. at ¶20; App. 109). "In short, the person is penalized for legal conduct while the police are rewarded for illegal conduct." ***Id.***

Young filed a petition for review which this court granted.

## STATEMENT OF FACTS

This appeal challenges the stop of the car in which Charles Young was a passenger. The relevant facts occurred between 11:30 p.m. and midnight on October 26, 2002, (45:5; App. 115). Kenosha Police Officer David Alfredson was patrolling in the area. The patrol area had "always" had "taverns and nightclubs." ***Id.*** Two relatively new bars had opened up in the neighborhood, "Coins," and "The Barn," which had become "very popular night spots." ***Id.*** Officer Alfredson was aware of several complaints from residents in the neighborhood "about people leaving beer bottles in their yards, loud music, being loud and boisterous going to and from the clubs." ***Id.*** Officer Alfredson testified that these complaints had made it a "priority to patrol the area" (45:6; App. 116).

At 11:49 p.m., Alfredson was driving down 21st Avenue between 52nd Street and 53rd Street, when he noticed a car parked on the east side of the street (45:7; App. 117). He noticed there were about five people in the car, and that it had Illinois license plates. ***Id.***

Alfredson kept driving after noticing the car, and stopped outside "The Barn" to break up some arguments going on outside that bar (45:7; App. 117). About five to ten minutes after first driving down 21st Avenue, Alfredson made a second pass down the street (45:8; App. 118). He testified that he "could tell it was still occupied, and that's when [he] stopped it." (45:8; App. 118). Asked

what had caught his attention about the car, Alfredson said:

> It was still occupied with five people in it. That length of time, they would have had time there to park and go out somewhere. They would have more than enough time to go out and do that, so it arose my suspicion for possible drinking or narcotics; so I'll stop and check it out.

(45:8; App. 118).

Having decided to perform an investigative stop of the car, Alfredson stopped his squad car in the roadway (45:9; App. 119). Because the road was narrow, and cars were parked on both sides of the street, Alfredson was unable to pull directly behind the car (45:14; App. 124). While in the roadway, Alfredson turned his "speed light" on the stopped car, and hit his flashing lights (45:9; App. 119). He went on to testify:

> The back passenger door opened up. I got out of my squad, and a black male got out of the vehicle. I ordered him back into the vehicle. He turned and started walking away from the vehicle. I then yelled louder. I said, "Get back in that car right now." And I started heading toward him around my squad. He turned and looked at me and started running up toward the house directly to the west of him. He ran up to the porch and tried to get into the door.

(45:9; App. 119).

Officer Alfredson struggled with the man—Charles Young—and Young tried to slip out of his coat (45:9; App. 119). Young did manage to get his coat off, and he threw it toward the door of the house. ***Id.*** Eventually, Alfredson handcuffed Young and retrieved the coat (45:10-11; App.120-21). In one of the pockets of the coat, the officer found a small glass container containing what was determined to be marijuana (45:11-

12; App.121-22). Alfredson then took Young to the Kenosha County Jail (45:12; App. 122).

The state charged Young in a three-count information with one count of possession of THC, one count of resisting an officer, and one count of obstructing an officer (6). Young filed a motion to suppress evidence, namely any physical evidence obtained from Young, as well as any fruits of the illegality (12:2). The court held a hearing on the motion. (45).

The state called Officer Alfredson to testify as described above. Young argued that the officer had seized him when he stopped his car and aimed the light onto the car. Young further argued that the officer had no reasonable suspicion that would warrant stopping the car in which Young was a passenger. Accordingly, he argued that all evidence derived after the illegal stop, including the marijuana, should be suppressed (45:18-19; App. 128-29).

The state opposed the motion, and the court denied the motion to suppress. The court said:

> The Court believes that based upon the officer's experience of what has occurred in the area, the officer had the right to make an investigatory stop as it were, ask the people, given the fact that they had remained in the car for a long time. Certainly had the defendant not left the vehicle the officer could have done nothing, just checked the vehicle out, who is in it, but had no right to arrest anyone at that point. The officer has had problems in that area before, and he is simply acting in a reasonable manner under the circumstances given the time of night which I believe was late, late night, given the area, given what he knows of the area. Had the defendant stayed in the vehicle the officer could have done nothing given the fact that the officer had the right to approach the vehicle and ask what was going on, what they were there for, but at that point nothing further. Once the defendant left the

> vehicle and refused to cooperate with the officer, refused to follow the officer's orders, I think the officer had the right to go further and eventually search the clothing as he did.

(45:19-20; App.129-30).

After the court denied Young's motion to suppress evidence, the case proceeded to trial. The state presented evidence of the police stop, of Young's walking and then running away from Officer Alfredson, and his struggle on the porch of the house he ran to. The state argued that Young's failure to obey the command to get back into the car, and instead walking away, constituted obstructing an officer (45:123). The state also argued that Young's failure to cooperate with the handcuffing constituted resisting an officer (45:124). The jury convicted Young on all three counts: possession of THC, obstructing an officer and resisting an officer.

Young appealed, and the court of appeals affirmed his conviction (App. 101-13). Young filed a petition for review which this court granted.

## ARGUMENT

### Introduction and Summary of Argument

This case involves the "seizure" of Charles Young, and the primary issue presented is *when* police seized Young for purposes of the Wisconsin Constitution and the Fourth Amendment to the United States Constitution.

Young contends that he was seized when a police car, with flashing lights, pulled up behind the car in which he was a passenger, and illuminated that car with a spotlight. He further contends that the police lacked reasonable suspicion to warrant the seizure at that point in time. As a result, he argues that this court should reverse the court of appeals' decision, hold that Young was

unreasonably seized, suppress all evidence following the seizure, and vacate his conviction for possession of THC.

In order to determine when Charles Young was seized during this police encounter, this court must decide what legal standard to apply. The court of appeals decided the case must be analyzed under ***California v. Hodari D.***, 499 U.S. 621 (1991), but urged this court to consider whether to depart from the federal standard and instead apply a different standard pursuant to state law and the Wisconsin Constitution.

Young asserts that under either ***Hodari D.*** or a different state standard, he was seized at that point when the police officer pulled up behind the car, with flashing lights, and with a spotlight trained on the car in which he was a passenger. He urges this court to reject the holding in ***Hodari D.***, however, as have many other state courts.

Young also contends that his conviction for obstructing an officer must be vacated because of insufficient evidence. In particular, the conviction cannot stand because an element of the crime of obstructing is that the police officer acted with lawful authority. Because the police officer did not have reasonable suspicion to seize Charles Young, that officer did not act with lawful authority. As a result, Young's conviction must be vacated.

The standards of review applicable in this case are as follows. Regarding the claim that the evidence is insufficient, this court may reverse only if the evidence is so insufficient that it can be said as a matter of law that no reasonable trier of fact could find guilt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Regarding the question of when the seizure occurred in this case, the trial court's findings of fact are upheld unless clearly erroneous. ***State v. Williams***, 2002 WI 94, ¶17, 255 Wis. 2d 1, 646 N.W.2d 834. The determination of when Young was seized is reviewed *de*

*novo,* although with the benefit of the analyses of the trial court and the court of appeals. ***Id.***

## I. THIS COURT SHOULD CONTINUE TO APPLY THE *MENDENHALL* TEST FOR WHEN A SEIZURE OCCURS, AND REJECT THE *HODARI D.* TEST.

The question presented in this case is at what point Charles Young was seized by the police. In order to answer this question, this court must decide what test to apply for determining when a seizure has occurred. This court can, as did the court of appeals, conclude that ***California v. Hodari D.***, 499 U.S. 621 (1991), controls. Or, the court can reject the test articulated in ***Hodari D.***, as have many other state courts, and continue to apply the pre-***Hodari*** standard articulated in ***United States v. Mendenhall***, 446 U.S. 544 (1980)[1].

Young contends that by either standard, he was seized when Officer Alfredson stopped his squad car behind the car in which Young was a passenger, turned on his flashing lights, and illuminated a spotlight on Young's car. Young urges this court, however, to take this opportunity to reject the test in ***Hodari D.*** and re-establish, under the Wisconsin Constitution, ***Mendenhall*** as the standard for determining when a seizure occurs.

An individual's right to be free from unlawful searches and seizures in Wisconsin is guaranteed by both the United States Constitution and the Wisconsin Constitution. The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution both guarantee the right to be free from unreasonable searches and seizures. Thus, Charles Young was protected from unreasonable search and seizure by two, independent sources: the United States Constitution and Wisconsin's Constitution.

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[1] *See* list and analysis ***infra*** at pp. 21-22

Generally, this court has followed United States Supreme Court decisions when deciding questions related to search and seizure. *See* ***State v. Eason***, 2001 WI 98, ¶ 37, 245 Wis. 2d 206, 629 N.W.2d 208. This court need not, however, conform its search and seizure jurisprudence to that of the Federal Court. This court may, and has, concluded that the Wisconsin Constitution affords greater protection than does the United States Constitution as interpreted by the Supreme Court.

> Certainly, it is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (January 1977). This court has never hesitated to do so.

***State v. Doe***, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977).

In ***State v. Hansford***, 219 Wis. 2d 226, 242-43, 580 N.W.2d 171 (1998), for example, this court held that the Wisconsin Constitution guarantees the right to a twelve-person trial in misdemeanor cases, even though the Federal Constitution does not. Further, in ***State v. Dyess***, 124 Wis. 2d 525, 534, 370 N.W.2d 222 (1985), this court concluded a jury instruction denied the defendant a substantial right—the right to have an undirected jury determination—based on state law, and thus did not discuss whether the instruction violated the Constitution pursuant to ***Sandstrom v. Montana***, 442 U.S. 510 (1979). Indeed, the Supreme Court has stated that the states may, in our own constitutions, adopt "individual liberties more expansive than those conferred by the Federal Constitution." ***Pruneyard Shopping Center v. Robins***, 447 U.S. 74, 81 (1980) (internal cites omitted).

It is the state courts, after all, that conduct the vast majority of criminal proceedings. For that reason alone, it is appropriate for this court to fashion a jurisprudence that makes sense for the citizens of Wisconsin, and when necessary, to depart from the dictates of the Supreme Court.

> Criminal law is an area of traditional concern for state judges. It is an area of law in which state judges have special experience and expertise. The very bulk of the criminal cases in the state trial court may justify a state's attempt to formulate rules to achieve stability of state law, relatively free of the changes wrought by the United States Supreme Court, and to achieve uniformity within the state judicial system.

J. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Texas Law Review, 1141, 1150 (1985).

### A. The Road To *Hodari D.*

Young contends that ***Hodari D.*** is a misstep by the Court in its search and seizure jurisprudence, and that this court should decline to follow its holding. A brief history of the cases leading to ***Hodari D.*** shows that the Court abruptly and imprudently changed the standard for when a seizure occurs.

From ***Terry v. Ohio***, 392 U.S. 1 (1968), through ***United States v. Mendenhall***, 446 U.S. 544 (1980), ***Florida v. Royer***, 460 U.S. 491 (1983), and ***Michigan v. Chesternut***, 486 U.S. 567 (1988), the Supreme Court has maintained a consistent position on when a seizure occurs and what the Fourth Amendment protects. ***Hodari D.*** represents a marked departure from the consistent standard.

In ***Terry***, the Court said that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." ***Terry***, 392 U.S.

at 16. In his concurrence, Justice Harlan wrote that an ordinary citizen, addressed by a police officer on the street, "has an equal right to ignore his interrogator and walk away...." ***Id.*** at 33.

In ***Mendenhall***, the Court said that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." ***Mendenhall***, 446 U.S. at 554. The Court listed examples of possible seizures, including the "use of language or tone of voice indicating that compliance with the officer's request might be compelled." ***Id.*** As in ***Terry***, the Court observed the right of a citizen to walk away:

> As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.

***Id.***

In ***Royer***, the Court repeated the caution that a police officer does not violate the Fourth Amendment simply by approaching an individual in a public place to ask if the individual is willing to answer some questions. ***Royer***, 460 U.S. at 497. But when a police officer approaches a citizen in such a manner, that person "may decline to listen to the questions at all and may go on his way." ***Id.*** at 498, *citing* ***Terry v. Ohio***, 392 U.S. at 32-33. "He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." ***Id.***, *citing* ***Mendenhall***, 446 U.S. at 556.

The Court in ***Royer*** also cited the ***Mendenhall*** standard for seizure with approval that a person is seized

when "a reasonable person would have believed that he was not free to leave." ***Royer***, 460 U.S. at 502.

In ***Chesternut***, the Court reiterated the test articulated in ***Mendenhall*** and ***Royer***, that is, that a person is seized only when "a reasonable person would have believed that he was not free to leave." ***Chesternut***, 486 U.S. at 573. The Court acknowledged that "[t]he test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." ***Id.***

In ***Chesternut***, police were on routine patrol in a marked police car. ***Id.*** They saw a man get out of a car and approach another man who was standing on a street corner. ***Id.*** When the man standing on the corner saw the police car, he turned and began to run. ***Id.*** The police followed him, caught up with him and then drove alongside of him. As they did so, the man dropped what later was discovered to be codeine pills out of his pocket. The police arrested the man and in a subsequent search, found drugs. ***Id.***

The suspect, Chesternut, moved to dismiss the charges on the ground that he had been unlawfully seized. ***Id.*** at 570.

The state argued the position ultimately adopted in ***Hodari D.***: that the Fourth Amendment "is never implicated until an individual stops in response to the police's show of authority." ***Id.*** at 572. The Court declined to apply the state-suggested standard (as well as the bright-line test proposed by Chesternut), stating that it would not apply a bright-line test. ***Id.*** The Court said that a bright-line test fails "to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure" must take into account the individual circumstances in each individual case. ***Id.***

Justices Kennedy and Scalia dissented in ***Chesternut***, presaging the holding in ***Hodari D.*** The Justices said that the "respondent's unprovoked flight gave police ample cause to stop him." ***Id.*** at 576. The dissenters continued:

> The case before us presented an opportunity to consider whether even an unmistakable show of authority can result in the seizure of a person who attempts to elude apprehension and who discloses contraband or other incriminating evidence before he is ultimately detained. It is at least plausible to say that whether or not the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him, *such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect.*

***Id.*** at 577 (emphasis added).

**B. *Hodari D.***

Having dissented in ***Michigan v. Chesternut***, Justice Scalia delivered the majority opinion in ***California v. Hodari D.***, 499 U.S. 621 (1991). In that case, two police officers were on patrol in a high-crime area of Oakland, California. ***Id.*** at 622. They were driving an unmarked police car. As they patrolled, they saw four or five youths huddled around a small red car parked at the curb. When the youths saw the car approaching, they "took flight." ***Id.*** at 623. The small red car also sped away. ***Id.***

The officers gave chase. One officer stayed in the car, the other officer got out of the car and ran after the youths. ***Id.*** at 623. Hodari was one of the youths who ran:

> Looking behind as he ran, he did not turn and see [Officer] Pertoso until the officer was almost upon him, whereupon he tossed away what appeared to be a small rock. A moment later, Pertoso tackled

> Hodari, handcuffed him, and radioed for assistance.Hodari was found to be carrying $130 in cash and a pager; and the rock he had discarded was found to be crack cocaine.

***Id.***

Hodari moved to suppress the evidence relating to the cocaine. The trial court denied the motion to suppress, but the court of appeals reversed. The California Court of Appeal held that Hodari had been seized when he saw Officer Pertoso running towards him, that this seizure was unreasonable under the Fourth Amendment, and that the cocaine evidence must therefore be suppressed. ***Id.***

The Supreme Court granted certiorari, and stated the issue presented this way: "The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield." The Court answered: "We hold that it does not." ***Id.*** at 626. The Court reasoned that the word "seizure" means not just a show of authority, but the subject's submission to that show of authority. ***Id.*** at 626. What is not a seizure, the Court said, is a police officer yelling at a fleeing subject to stop without the desired result. ***Id.***

In reaching this conclusion, the Court did not outwardly reject the test articulated in ***Mendenhall*** for when a seizure occurs, but rather added to the test. The Court said that a seizure occurs when a reasonable person would believe that he or she is not free to leave ***and*** there is either physical force or actual submission to the police authority. ***Id.*** at 628. Thus ***Hodari D.*** adds an element to the test. Not only must the subject believe he or she is not free to leave, but the subject must submit to the police show of authority.

The Court's holding in ***Hodari D.*** has been much criticized.[2] The overriding problem with the Court's decision in ***Hodari D.*** is that it severely limits the reach of the protection offered by the Fourth Amendment. The Fourth Amendment protects the citizen's right to personal security and to be free from "all restraint or interference of others, unless by clear and unquestionable authority of law." ***Terry***, *quoting* ***Union Pac R. Co. v. Botsford***, 141 U.S. 250 (1891). It is well settled that seizures that fall short of a traditional arrest still must be "reasonable." *See* ***Brown v. Texas***, 443 U.S. 47, 50 (1979). That "reasonableness" in this context "depends on a balance between the public interest and the citizen's right to personal security free from arbitrary interference by law officers." ***Id.***, quoting ***Pennsylvania v. Mimms***, 434 U.S. 106, 109 (1977). But ***Hodari D.*** removes constitutional protection from a vast array of police contacts.

The effect of ***Hodari D.*** is to isolate from constitutional scrutiny a great deal of contact between the citizen and law enforcement. Under ***Hodari D.***, so long as the citizen does not submit to the show of police power, the police action is immune from review by a court. This court should reject that retreat from the constitutional right to be free from unreasonable searches and seizures, including those that fall short of a formal arrest.

Two key flaws in ***Hodari D.*** warrant this court's rejection of it as the proper test for when a seizure occurs. First, the ***Hodari D.*** test shifts the focus from the actions of the police in determining when a seizure occurs to a focus on the reaction of the citizen. Second, the decision fails to recognize that pursuit and attempted arrest constitute substantial interference with personal security that warrant constitutional protection.

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[2] *See* LaFave, Search and Seizure, Vol. 4, §9.4(d) (4th Ed.)

### C. *Hodari D.* Improperly Shifts The Focus From The Police Action To The Citizen's Action.

Traditionally, the focus of the Fourth Amendment is on the actions of the police in interfering with a citizen's liberty. A chief concern is to "assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." ***Brown***, 443 U.S. at 51 (internal cites omitted).

This focus on police conduct is consistent with the primary purpose of the exclusionary rule: deterrence of unreasonable searches and seizures. *See* La Fave, Search and Seizure, Vol I., § 1.1(f), at 21 (4th Edition). The exclusionary rule is calculated to prevent abuses, not to repair them. ***Id.***, citing ***Elkins v. United States***, 364 U.S. 206 (1960). As the Court said in ***Terry***:

> Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct...Thus its major thrust is a deterrent one...and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a "mere form of words."....
>
> The rule also serves another vital function—"the imperative of judicial integrity"...A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

***Terry***, 392 U.S. at 12-13 (internal cites omitted).

***Hodari D.*** marks a significant shift from the deterrent effect of the exclusionary rule and its focus on law enforcement's actions. Under ***Hodari D.***, the lawfulness of the police action is determined not by what the officer knew when he or she decided to seize an individual. Rather, ***Hodari D.*** instructs that the lawfulness of the police action can turn on the citizen's reaction to it. So, if a police officer effects an unlawful seizure and the subject submits to the unlawful authority, tainted evidence can be suppressed. If, however, a police officer decides to seize an individual without reasonable suspicion and that individual walks away, avoiding that police contact, ***Hodari D.*** converts an unlawful police action to a lawful one. This flies in the face of our tradition of protecting a personal liberty and security and freedom from unlawful interference.

As professor LaFave writes:

> [W]hat the Court in Hodari D. ought to have recognized is that the "not free to leave" concept of Mendenhall-Royer has nothing to do with a particular suspect's choice to flee rather than submit or with his assessment of the probability of successful flight.

LaFave, Vol. 4 at 460.

As the Court recognized in ***Brower v. County of Inyo,*** 489 U.S. 593 (1989), "the character of the pursued suspect's evasive action did not somehow relieve the pursuing officer of his responsibility to conform to Fourth Amendment limitations." ***Id.***

***Hodari D.*** also means that the Court determines the reach of the Fourth Amendment retrospectively rather than prospectively. Up until ***Hodari D.***, the reasonableness of a seizure was determined by what the officer knew at the time of the decision to stop the individual. So, for example, in the area of traffic stops, the lawfulness of the stop is determined by whether "there

was a pre-existing sufficient quantum of evidence to justify the stop." La Fave, Vol. 4, § 9.3 at 360. A police officer may make an investigatory stop if, *at the time of the stop*, the officer has "specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot." ***State v. Waldner***, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996) (emphasis added).

***Hodari D.*** abandons this notion of a pre-existing quantum of evidence, and in cases where the subject of the police contact walks or runs away, that subject's conduct renders the police action lawful even if it was not at its inception. The problem is that police must know *in advance* whether their conduct will implicate the Fourth Amendment. *See* ***Chesternut***, 486 U.S. at 574. Further, a focus on police action rather than the citizen's action has the virtue of furthering consistent adherence to constitutional constraints: "it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police." ***Id.*** Focusing the definition of seizure on the police officer's conduct, and not the suspect's conduct, results in the same state constitutional implications for similar police conduct. ***Hodari D.*** removes that consistency.

### D. *Hodari D.* Fails To Grant Constitutional Protection To Police Pursuits And Attempted Arrests.

In addition to its focus on the citizen's action rather than police conduct, the ***Hodari D.*** analysis is flawed because it fails to recognize that an attempted arrest and pursuit constitute substantial interferences with personal liberty that should fall within the reach of the Fourth Amendment. As the dissenters wrote in ***Hodari D.***, the Court's decision means "that a police officer may now fire his weapon at an innocent citizen and not implicate the Fourth Amendment—as long as he misses his target." ***Hodari D.***, 499 U.S. at 630 (dissent).

Thus, ***Hodari D.*** ignores the fact that any meaningful interference by a police officer of a citizen, however brief, implicates the Fourth Amendment. There can be no doubt that a police chase of a citizen constitutes a "very substantial intrusion upon Fourth Amendment values." La Fave, Vol 4, §9.4 at 459:

> The person being pursued (and a reasonable person in his shoes) knows that "the object of chase is capture," that is, that the police purpose is "to restrain his liberty, not merely to be afforded the opportunity to talk to him," that consequently "if he stopped running, he would not be free to leave," and that "in effecting his capture, the police will resort to physical force if necessary."

The idea that a police officer's arbitrary decision to commence a chase of a citizen falls outside the scope of the Fourth Amendment simply cannot be sustained. As the court said in ***Commonwealth v. Thibeau,*** 384 Mass. 762, 429 N.E.2d 1009 (1981): "pursuit that appears designed to effect a stop is no less intrusive than a stop itself."

The Court's decision has another fatal flaw in that it effectively eliminates meaningful judicial review in a broad class of search and seizure cases. In ***Terry***, the Court said that the Fourth Amendment's protections are meaningful only when police conduct is subjected to the detached, neutral scrutiny of a judge:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

***Terry,*** 392 U.S. at 21.

But under ***Hodari D.***, because the focus is on the citizen's response to the police action, the police actions will not be subject to this neutral judicial review if the citizen does not submit to the police authority.

### E. Other States Have Declined To Follow *Hodari D.*

The flaws in the ***Hodari D.*** analysis have led a number of states to reject its holding on respective state constitutional grounds. The Supreme Court of New Jersey decided that to conform to the test of ***Hodari D.*** "would require too radical a change in our search-and-seizure law." ***State v. Tucker***, 136 N.J. 158, 642 A.2d 401, 405 (1993). The Supreme Court of Tennessee explained its disagreement with ***Hodari D.*** and summarized the criticisms of the Court's decision this way:

> First, the majority's analysis in ***Hodari D.*** represents a marked departure from the standard the Supreme Court adopted in [***Mendenhall***]...that a seizure occurs when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." Second, the majority's analysis fails to apply common law principles under which an arrest would not be distinguished from an attempted arrest in determining whether a person has been seized. Third, the majority's analysis is flawed for practical reasons and is subject to potential abuse by officers who pursue a subject without reasonable suspicion and use a flight or refusal to submit to authority as reason to execute an arrest or search.

***State v. Randolph***, 74 S.W.2d 330, 336 (Tenn. 2002).

In ***Jones v. State***, 745 A. 2d 856, 863-64 (Del. 1999), the Delaware Supreme Court also declined to follow ***Hodari D.***, concluding that ***Hodari D.*** is not consistent with that state's view of when a person is

seized within the meaning of the Delaware Constitution. The Delaware court said that it had never before decided whether, and under what circumstances, its constitution "should be interpreted to provide protections that are greater than the rights accorded citizens by the Fourteenth Amendment as it has been interpreted by the United States Supreme Court." ***Id.*** at 861. The court concluded, however, that the Delaware Constitution requires focusing upon the police officer's actions to determine "when a reasonable person would have believed he or she was not free to ignore the police presence." ***Id.*** at 869.

A significant number of other state courts also have rejected the Court's holding in ***Hodari D.***, finding it to be inconsistent with their state constitutions: ***State v. Young***, Wash. Supr., 135 Wn. 2d 498, 957 P.2d 681, 687 (1998); ***Commonwealth v. Matos***, Pa. Supr., 543 Pa. 449, 672 A.2d 769, 776 (1996); ***State v. Tucker***, N.J. Supr. 136 N.J. 158, 642 A.2d 401, 405 (1994); ***State v. Tucker***, La. Supr., 626 So. 2d 707, 712 (1993); ***In re Welfare of E.D.J.***, Minn. Supr., 502 N.W.2d 779, 783 (1993); ***State v. Quino***, Haw. Supr. 74 haw. 161, 840 P.2d 358, 362 (1992), *cert. denied*, 507 U.S. 1031 (1993); ***State v. Oquendo***, 223 Conn. 635, 613 A.2d 1300, 1310 (Conn. 1992); ***Baker v. Commonwealth***, 5 S.W. 3d 142, 145 (Ky. 1999); ***Commonwealth v. Stoute***, 422 Mass. 782, 665 N.E.2d 93, 94-98 (Mass. 1996); ***People v. Bora***, 83 N.Y.2d 531, 634 N.E.2D 168, 167-70 711 N.Y.S.2d 796 (N.Y. 1994); ***State v. Clayton***, 45 P.3d 30, 33-34 (Mont. 2002).

### F. Wisconsin Should Likewise Decline to Follow *Hodari D.*

Like so many other states, this court should decline to follow ***Hodari D.*** First, the courts in this state have already embraced the ***Mendenhall-Royer*** test for when a seizure occurs. Second, because the Supreme Court's reasoning in ***Hodari D.*** is so fundamentally flawed, this

court should conclude that our own constitution warrants a different result.

Like the court in ***Tucker***, this court should conclude that conforming Wisconsin's search and seizure doctrine to that expressed in ***Hodari D.*** would require too radical a change in our search and seizure law. Indeed, in this state, the ***Mendenhall-Royer*** test for when a seizure occurs is predominant. In ***State v. Kramar***, 149 Wis. 2d 767, 440 N.W.2d 317 (1989), for example, before ***Hodari D.***, this court used the ***Mendenhall-Royer*** test to determine whether a seizure has occurred: "A person is seized within the meaning of the fourth amendment only if, in view of all the circumstances, a reasonable person would have believed he was not free to leave." ***Id.*** at 781. Echoing the language in Mendenhall, this court explained:

> Examples of circumstances that might indicate a seizure would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

***Id.*** at 781-82.

After ***Hodari D.***, both the court of appeals and this court have continued to use the ***Mendenhall-Royer*** test to determine whether a seizure has occurred. In ***State v. Stout***, 2002 WI App 41, 250 Wis. 2d 768, 641 N.W.2d 474, for example, the court relied on the ***Mendenhall*** test for a seizure. ***Id.*** at 784. In ***State v. Williams***, 2002 WI 94, ¶21, 255 Wis. 2d 1, 646 N.W.2d 834, this court relied on the ***Mendenhall*** test for determining whether a police contact constitutes a seizure.

This court has had occasion, however, to explicitly consider the application of ***Hodari D.***, most notably in ***State v. Kelsey C.R.***, 2001 WI 54, 243 Wis. 2d 422, 626

N.W.2d 777. ***Kelsey C.R.***, however, can fairly be viewed as a "community caretaker" case, and one that did not fully consider whether Wisconsin's Constitution might differ from the United States Constitution as interpreted by the Supreme Court.

The court recited the facts in ***Kelsey C.R.*** this way:

> Two police officers came upon Kelsey sitting alone after dark in a high-crime neighborhood. The officers were concerned that she was a runaway so they began asking her questions. After Kelsey had responded to a few questions, the police told her to "stay put." Kelsey then fled from the police. The police chased and eventually caught her. The officers detained Kelsey, and had a pat-down search of her person for weapons conducted. The police found a loaded handgun on Kelsey, and she was charged with possession of a dangerous weapon. Kelsey moved the circuit court to suppress the results of the pat-down—the handgun—as evidence.

***Id.*** at ¶1.

The first issue addressed by the court was whether the police had "seized" Kelsey when the officer told her to "stay put" but she ran away. ***Id.*** at ¶2. The state argued that ***Hodari D.*** controlled, and that Kelsey was not seized then because she ran away. This court agreed. ***Id.*** at ¶33. Because she did not submit to the police authority to "stay put," the court held that she was not seized until the police caught her after a 30 to 40 second chase. ***Id.***

Importantly, however, this court went on to say that even if the order to "stay put" did constitute a seizure, that seizure was proper under the community caretaker function. ***Id.*** at ¶34. Given that Kelsey was a juvenile, alone, after dark in a high-crime neighborhood, it was reasonable for the police to intervene under its community caretaker function. ***Id.*** at ¶37. Because

***Kelsey C.R.*** fits into the community caretaker rubric, the court did not need to delve into the flaws in ***Hodari D.***, or to consider whether the Wisconsin Constitution might warrant a different result.

The decision in ***Kelsey C.R.*** has since been recognized as a community caretaker case to at least the same degree as it is considered a ***Hodari D.*** case. In ***State v. Clark***, 2003 WI App 121, ¶20, 265 Wis. 2d 557, 666 N.W.2d 112, for example, the court cited ***Kelsey C.R.*** as an example of a seizure made in the course of a community caretaker function, thus negating the need for reasonable suspicion of criminal activity.[3]

In sum, although there has been an acknowledgement of ***Hodari D.*** in this state, this court should now clarify, pursuant to Article 1, Section 11, of the Wisconsin Constitution, that the ***Mendenhall-Royer*** standard is the test for when a seizure occurs, not the test articulated in ***Hodari D.*** This result is warranted because the ***Hodari D.*** test improperly focuses the attention on the citizen's actions rather than the actions of law enforcement, and because it fails to recognize the substantial interference with personal liberty caused by pursuit or attempted arrest.

This court should resist the effort to remove a vast number of police contacts with citizens from constitutional scrutiny, and take the opportunity to reinvigorate the citizen's right to disregard questions from the police and to walk away. As the court of appeals said in its decision, after ***Hodari D.***, the citizen's supposed right to "go on his way" is now "an empty right because it

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[3] The court of appeals has also, however, cited ***Kelsey C.R.*** in support of the assertion that the law in Wisconsin is that in order to effect a seizure, the officer must make a show of authority and the citizen must submit to that show of authority. ***State v. Powers***, 2004 WI App 143, 275 Wis. 2d 456, 685 N.W.2d 869.

vests the police with the authority to pursue and detain anew." (Slip op at ¶20; App. 109).

## II. CHARLES YOUNG WAS SEIZED WHEN A POLICE OFFICER STOPPED HIS SQUAD CAR IN THE ROADWAY BEHIND YOUNG'S CAR, PUT ON HIS FLASHING LIGHTS, AND ILLUMINATED A SPOTLIGHT ON THE CAR.

Even if this court decides that ***Hodari D.*** is the rule in Wisconsin, Young contends that ***Hodari D.*** is inapplicable here.

The case at bar is distinguishable from ***Hodari D.***. The show of authority was much greater here. Further, Young was clearly not free to leave, he briefly submitted to Officer Alfredson's authority, and he jettisoned the contraband later in the police encounter than Hodari. Unlike the youth in ***Hodari D.***, Charles Young was seized at that moment when the police officer stopped his squad car in the road behind the car in which Young was a passenger, turned on his flashing lights, and illuminated a spotlight into Young's car. These actions by Officer Alfredson constituted a show of authority such that he seized Young and the others in that car at that moment. Applying the ***Mendenhall-Royer*** test, no reasonable person would have felt free to leave under these circumstances.

Further, the record shows that Officer Alfredson made the decision to seize Young and the others before Young took any action at all. If it can properly be called flight, it was not his flight that drew Officer Alfredson's attention to those young men. Officer Alfredson had made the decision to stop that car and its occupants after observing that it remained parked for five to ten minutes, with five people in it, late at night. He testified at the suppression hearing: "...I could tell it was still occupied, and that's when I stopped it" (45:8).

Any doubt as to whether the car and its occupants were seized is resolved by the fact that Young and the others were, in fact, not free to leave. It cannot seriously be argued that a driver sitting in a parked car under these circumstances could turn the key in the ignition, and freely drive away with his passengers. The facts here are very different from the facts in ***Hodari D.*** There, the police were on patrol in an unmarked car. Hodari and others were standing around a car parked at the curb. They ran as soon as they saw the police car approaching.

Here, the officer's car circled the block and the car in which Young was a passenger did not move. These individuals made no move to flee the police at first sight: Officer Alfredson, in a marked squad car, had already passed the car in which Young and the others were sitting, and no one took evasive action.

In ***Hodari D.***, there was no show of authority at all before the fleeing. Here, there was a significant show of authority: the flashing lights, parking behind the suspects' car, the spotlight.

Further, the facts in this record show that, unlike Hodari, Young did at least initially submit to the officer's authority. The record shows that before Alfredson got out of his squad car, he took the time to illuminate the car with a spotlight, hit his flashing lights and he advised dispatch of his location (45:9). Only then did Alfredson see the back passenger door open, and a black male get out of the car. ***Id.***. Alfredson ordered him back into the car. ***Id.*** The passenger—Young—must have been looking in Alfredson's direction at least momentarily because Alfredson testified that "he turned and started walking away from the vehicle." ***Id.*** Alfredson yelled at him again. Alfredson started towards Young. Young then turned and looked at Alfredson and started to run to a house to the west of him. ***Id.***

Those moments when Young remained in the car as Alfredson shined the spotlight, turned on his flashing lights, and called in his location distinguish ***Hodari D.***. Further, those moments when Young looked at Alfredson while Alfredson was telling him to stay in the car present facts very different from those in ***Hodari D.*** Unlike ***Hodari D.***, the police made a serious show of authority here, and at least momentarily, Young was seized because his personal security and freedom were encumbered by that police show of authority.

Another distinction between ***Hodari D.*** and this case is the moment when the contraband was discarded. Hodari threw away the contraband cocaine moments before the police grabbed him. ***Hodari D.***, 499 U.S. at 623. Young threw his coat, containing the marijuana, during the capture. The court of appeals dismissed this temporal distinction, saying that the application of the Fourth Amendment should not turn on "such temporal hairsplitting that allows for the admission of evidence discarded at a certain moment, but requires suppression of evidence discarded a split second later." (Slip op. at ¶18; App. 108).

Yet cases interpreting the reach of the Fourth Amendment have long been decided on small factual differences. As the Supreme Court said in ***Chesternut***, in determining whether an investigative pursuit is or is not a seizure under the Fourth Amendment, the Court adheres to a "traditional contextual approach," taking into consideration all of the circumstances surrounding the incident in each individual case. ***Chesternut***, 486 U.S. at 572. While such an approach lacks the ease of a bright-line rule, it is the approach courts have long used. Further, Justices Scalia and Kennedy, in their dissent in ***Michigan v. Chesternut***, in which they prefaced the majority decision in ***Hodari D.***, suggested that the timing of the jettisoning of contraband is indeed critical:

> The case before us presented an opportunity to consider whether even an unmistakable show of authority can result in the seizure of a person who attempts to elude apprehension and who discloses contraband or other incriminating evidence *before he is ultimately detained.*

***Chesternut,*** 486 U.S. at 577 (dissent) (emphasis added).

## III. THE POLICE LACKED REASONABLE SUSPICION TO WARRANT THE SEIZURE

Officer Alfredson's seizure of Young and the others was unlawful as he lacked the kind of specific and articulable facts that would justify a reasonable conclusion that a crime was being committed.

A police officer may, under the appropriate circumstances, make an "investigatory" stop, short of an arrest. ***State v. Waldner***, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996). Such an investigatory stop is lawful if, at the time of the stop, the officer has "specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot." ***Id.*** The officer's "hunch," even when informed by experience, is insufficient to justify an investigatory stop. ***Id.*** at 57; ***State v. Fields***, 2000 WI App 218 , ¶ 21, 239 Wis. 2d 38, 619 N.W.2d 279.

The question of what constitutes reasonableness is necessarily imprecise, and is a common-sense test.

> This common sense approach strikes a balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility.

***Waldner***, 206 Wis. 2d at 56.

Officer Alfredson had the following information at the time that he decided to stop the car in which Young was a passenger: It was 11:49 p.m. The car had been

parked for five to ten minutes. He observed five people sitting in the car. The car had Illinois license plates. There are a number of taverns and popular nightspots in the area in which the car was parked. The police department had received complaints about noise and litter due to the taverns.

Alfredson's observations simply do not rise to the level of a reasonable suspicion that a crime is taking place, has taken place, or soon will take place.

The stop in this case violates that balance between an individual's privacy and the police role in detecting crime. Quite simply, five people sitting in a car at night does not give rise to a suspicion that criminal activity is afoot. The officer did not testify that he could hear noise from the car, such as loud music that might bother the neighbors. The officer did not testify that he saw anything happening inside the car, such as movement that might suggest drug use. The officer did not testify that the occupants were doing anything suspicious at all. Rather, his testimony was solely that

> [the car] caught my attention the one time I noticed it. It was [there] that time, and I went around the block and [talked] with people at the bar; and I could tell it was still occupied, and that's when I stopped it.

(45:8; App. 118).

Not only did Officer Alfredson not see any suspicious behavior, he failed to take simple steps that might have led to a proper stop. He could have, for example, continued to circle the block to keep an eye on these individuals. He could have parked nearby, and observed the car for a time. Rather than take additional reasonable steps to investigate the situation, he simply seized Young and the others.

The facts in this case differ dramatically from other cases in which the stops were found to be reasonable. In ***Waldner***, for example, the officer observed a car at approximately 12:30 a.m. The car was traveling down the street quite slowly and stopped at an intersection even though it had no traffic light or stop sign. ***Waldner***, 206 Wis. 2d at 53. The car then turned onto a cross street and accelerated quickly. The driver of the car then pulled into a legal parking place on the street. ***Id.*** The officer saw the driver's side door open, and saw the driver pour a mixture of liquid and ice from a plastic glass onto the road. ***Id.*** The court ruled the ensuing stop was lawful. As the court correctly concluded, while none of these actions is illegal, together they gave rise to the inference that the driver might be intoxicated. ***Id.*** at 58.

In another case, ***State v. Amos***, 220 Wis. 2d 793, 584 N.W.2d 170 (Ct. App. 1998), the court held an investigatory stop lawful given that the suspect was parked in a parking lot which had a "no trespassing sign," the car was in an area known to the police as an area where drug sales were commonly made from parked cars, and the police observed a woman approach the parked car, appear to see the police, at which point she turned and moved quickly out of the parking lot. ***Id.*** at 799-800.

No analogous suspicious facts exist in this case. Indeed, the facts here do not even rise to the level of those in ***State v. Young***, 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997), in which the court concluded the police officer's stop was not reasonable. ***Id.*** at 433. In ***Young***, the suspect was stopped because he was in a "high drug-trafficking area" where he had a "short-term contact" with another individual. ***Id.*** at 429. The officer knew from experience that drug sales often involve a short-term contact, giving rise to the suspicion of illegal activity. ***Id.*** at 428.

The court rejected the argument that these facts alone justified the police seizure of the defendant. The

court said: "We observe that stopping briefly on the street when meeting another person is an ordinary, everyday occurrence during daytime hours in a residential neighborhood." ***Id.*** at 429.

Similarly, sitting in a parked car at night, with others, in a residential area which also includes popular taverns and nightclubs, does not reasonably suggest unlawful activity. This incident occurred on a night in October, presumably a night where it was fairly cool, and so logically individuals are more likely to sit inside a car than to sit outside. Like the conduct observed in ***Young***, the conduct that Officer Alfredson observed and considered suspicious is conduct that "large numbers of innocent citizens engage in every day for wholly innocent purposes," even in neighborhoods where citizens have complained about noise and litter.

Similarly, the court in ***Helmsley v. United States***, 547 A.2d 132 (D.C. Cir. 1988), concluded that a police officer who observed two men sitting in a parked car, with the inside dome light on, with the windows rolled up and with a "good deal of smoke inside the passenger compartment" did not have a reasonable suspicion to seize the men, even in a high-crime area. ***Id.*** at 133-34. Nor did the police have reasonable suspicion to stop in ***People v. Wilkins***, 186 Cal. App. 3d 804, 231 Cal. Rptr. 1 (1986). In ***Wilkins***, the police officer was on routine patrol at approximately 10:30 on a January night, when he saw two people in the front seat of a car, who seemed to duck down in their seats as he went by. ***Id.*** at 807. The court concluded that even though the incident occurred at night, in a high-crime area, and the car's occupants acted to avoid the police, there was insufficient basis to stop the individuals. ***Id.*** at 811.

Absent something more, in this case Officer Alfredson lacked sufficient basis to reasonably conduct a stop. Accordingly, all evidence derived after the unlawful stop must be suppressed. Evidence derived due to an

illegal seizure is suppressed as "fruit of the poisonous tree." ***Wong Sun v. United States***, 371 U.S. 471, 487-88 (1963). In this case, evidence of Young's identity, the discovery of the marijuana, and the resisting and obstructing all constituted fruits of the illegal seizure, and thus must be suppressed.

## IV. BECAUSE THE POLICE LACKED REASONABLE SUSPICION FOR THE SEIZURE, THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT YOUNG'S CONVICTION FOR OBSTRUCTING.

In addition to charging Young with possession of marijuana, the state charged him with obstructing an officer and resisting an officer, both contrary to Wis. Stat. § 946.41. The state argued that Young obstructed Officer Alfredson when he walked away from the car and failed to comply with the order to get back into the car (45:122-23). The state argued that Young resisted Officer Alfredson when he struggled with him and would not cooperate with being handcuffed (45:124).

As suggested by the court of appeals in its opinion, footnote 7, the evidence in this record is insufficient to support Young's conviction for obstructing an officer. The standard of review for determining whether the evidence is sufficient to support a conviction was articulated in ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990):

> [A]n appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

The court of appeals said in ***State v. Grobstick***, 200 Wis. 2d 242, 249, 546 N.W.2d 242 (Ct. App. 1996), citing ***Poellinger***, 153 Wis. 2d at 507:

> If any possibility exists that the jury could have drawn the appropriate inferences from the evidence to find the requisite guilt, we may not overturn a verdict even if we believe the jury should not have found guilt.

In order to convict Charles Young of obstructing an officer, the state had to prove, beyond a reasonable doubt, that Officer Alfredson was doing an act in an official capacity and with lawful authority when Young obstructed him. The state failed to meet its burden of proof here because it could not prove Alfredson acted with lawful authority.

In its closing argument to the jury, the state argued that Alfredson was acting with lawful authority by checking out this car:

> We want officers to check things out. This is what Officer Alfredson was doing on that date. He was patrolling the area he's assigned to and carrying out these duties. He was acting with lawful authority. This wasn't something he chose to do on his own behalf. It's not a personal task he's taking on. It's actually what we are paying him to do.

(45:123).

The state's argument, however, blurs the different elements of obstructing an officer by combining the element of doing an act with lawful authority and an action taken within the officer's official capacity. Acting with lawful authority and acting within official capacity are two separate elements. ***State v. Barrett***, 96 Wis. 2d 174, 181, 291 N.W.2d 498 (1980).

Young concedes that Alfredson was acting in his official capacity. He disputes, however, that he was

acting with lawful authority. As shown above, Officer Alfredson was not acting with lawful authority because he did not have reasonable suspicion to effect the stop in the first place. Because the officer lacked reasonable suspicion that Charles Young had committed or was about to commit a crime, the officer was not acting with lawful authority. It necessarily follows, therefore, that the evidence was insufficient as a matter of law to support the conviction.

## CONCLUSION

For the reasons argued above, Charles Young, the defendant-appellant-petitioner, asks this court to reverse the decision to deny his motion to suppress, and further to vacate his conviction for obstructing an officer.

Date this 23rd day of March, 2005.

Respectfully submitted,

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## CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 9,598 words.

Dated this 23rd day of March, 2005.

Signed:

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# *APPENDIX*

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**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 17, 2004**

Cornelia G. Clark
Clerk of Court of Appeals

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 03-2968-CR** **Cir. Ct. No. 02CF001213**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,



V.

CHARLES E. YOUNG,

DEFENDANT-APPELLANT.

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APPEAL from judgments of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 NETTESHEIM, J. Charles E. Young left the scene of a *Terry*[1] stop without submitting to the police show of authority. The police pursued and

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

captured Young and later discovered THC in a coat that Young discarded during the capture. Because Young did not submit to the police show of authority, we hold that ***California v. Hodari D.***, 499 U.S. 621 (1991), precludes Young's claim that he was illegally seized under the Fourth Amendment. Consequently, we uphold the trial court's order denying Young's motion to suppress and we affirm the judgments of conviction for possession of THC, resisting an officer and obstructing an officer.

## BACKGROUND

¶2 The facts of this case are not in dispute. We take them from the evidence adduced at both the suppression hearing and the ensuing jury trial. On October 26, 2002, City of Kenosha Policer Officer David Alfredson was patrolling an area of the city where taverns and popular nightspots are located. Residents of the area had previously complained about "people leaving beer bottles in their yards, loud music, [people] being loud and boisterous going to and from the clubs." Alfredson was patrolling the area in light of these complaints.

¶3 As Alfredson was driving on 21st Avenue between 52nd Street and 53rd Street, he noticed a car bearing Illinois license plates parked on the east side of the avenue and occupied by about five people, including Young. Alfredson continued driving, stopping at one point to break up an argument outside a bar. About five to ten minutes later, Alfredson was again driving down 21st Avenue and noticed the same car still occupied by the same number of people. Alfredson decided to, in his words, "stop" the vehicle because:

> It was still occupied with five people in it. That length of time, they would have had time there to park and go out somewhere. They would have more than enough time to go out and do that, so it arose my suspicion for possible drinking or narcotics; so I'll stop and check it out.

¶4 Alfredson's decision to detain the vehicle and its occupants was consistent with his practice.

> As I'm patrolling the area specifically around the taverns, I'm looking for occupied vehicles occupied for a length of time. I'll drive by and come back a little while later, a couple of minutes, five minutes. If it's still occupied, I'll stop and check the vehicle to see if people are drinking in the vehicle, narcotics, loud music, if they are playing the stereo too loud.

¶5 Alfredson stopped his squad car in the roadway adjacent to a vehicle that was parked behind the suspect vehicle. He activated his flashing emergency lights and used his spot light to illuminate the vehicle.[2] Alfredson then observed Young exit the vehicle from the backseat. Alfredson exited his squad and ordered Young back into the vehicle. Young "turned and started walking away from the vehicle." Alfredson yelled to Young, "Get back in that car right now." Young again turned, looked at Alfredson, and then started running toward a nearby house. Alfredson took up pursuit and caught Young at the porch of the residence as Young was trying to gain entry. During the struggle, Young discarded his coat, throwing it toward the door of the residence. Eventually, Alfredson subdued and handcuffed Young, retrieved the coat, and discovered what he believed to be marijuana in a vial located in one of the coat pockets. Further testing confirmed Alfredson's belief.

¶6 The State charged Young with possession of THC, resisting an officer and obstructing an officer. Young pled not guilty and filed a motion to

[2] In his testimony at the motion to suppress, Alfredson said he activated the "speed light" of his police squad. The State interprets this to mean the "spot light" of the vehicle. Young did not dispute this interpretation in his reply brief or at oral argument. We therefore adopt the State's interpretation.

suppress all the evidence resulting from Alfredson's pursuit and capture of him. Young argued as follows: (1) he was illegally seized under the Fourth Amendment when Alfredson detained the vehicle and its occupants because Alfredson did not have the requisite reasonable suspicion under *Terry* as codified by WIS. STAT. § 968.24 (2001-02);[3] (2) as a result, Young was free to depart the scene without further police intervention; and (3) consequently, all evidence obtained as a result of Alfredson's ensuing pursuit and capture of Young should be suppressed.

¶7 The trial court denied Young's motion, ruling that Alfredson had reasonable suspicion to detain the vehicle and its occupants. Therefore, the court reasoned that Alfredson was entitled to take up pursuit when Young exited the vehicle, failed to comply with Alfredson's orders to return to the vehicle, and then ran from the scene.

¶8 At the ensuing trial, a jury found Young guilty of all three counts. Young appeals from the judgments of conviction contending that the trial court erroneously denied his motion to suppress.

## DISCUSSION

¶9 Young's argument on appeal tracks the argument he made in the trial court: (1) the occupants of the vehicle were illegally seized within the meaning of the Fourth Amendment because Alfredson did not have reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968), as codified by WIS. STAT. § 968.24; and

[3] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

(2) therefore, he was free to leave the scene and all evidence resulting from the ensuing pursuit should have been suppressed.

¶10 We will assume for purposes of argument that Alfredson did not have the requisite reasonable suspicion under WIS. STAT. § 968.24 when he decided, in his words, to "stop" the vehicle.[4] However, our assumption does not avail Young because we conclude under ***Hodari D.*** that Young was not seized within the meaning of the Fourth Amendment because he did not submit to Alfredson's show of police authority. Until such a submission occurs, ***Hodari D.*** holds that a person is not seized for purposes of the Fourth Amendment and therefore the person will not be heard to assert a Fourth Amendment violation. ***Hodari D.***, 499 U.S. at 629.

¶11 In ***Hodari D.***, the police were patrolling a high-crime area when they saw four or five youths, including Hodari, huddled around a car parked at a curb. ***Id.*** at 622. When the youths saw the police car, they fled on foot. ***Id.*** at 622-23. The car also departed at a high rate of speed. A police officer took up the chase of Hodari. ***Id.*** at 623. Just before the officer captured him, Hodari tossed away what

[4] Although we do not decide this issue, we nonetheless harbor doubt that Alfredson had reasonable suspicion under WIS. STAT. § 968.24 to detain the vehicle or its occupants. We question whether, without more, the mere presence of five individuals in a parked car for a period of five to ten minutes at approximately midnight in an area of taverns and nightclubs constitutes reasonable suspicion that the occupants of the vehicle were committing, were about to commit, or had committed a crime or other violation. We take particular note that Alfredson did not testify to any observations suggesting that the occupants of the vehicle were engaging in any conduct related to the citizen complaints of debris and excessive noise. Nor did the occupants' conduct suggest any other criminal activity. As such, Alfredson's detention of the vehicle smacks more of an "unparticularized suspicion or hunch" than solid reasonable suspicion. *See* ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). Although defending the trial court's ruling that reasonable suspicion existed, the State acknowledged at oral argument that its ***Hodari D.*** argument represented its stronger argument. *See* ***California v. Hodari D.***, 499 U.S. 621 (1991).

appeared to be a small rock. ***Id.*** The investigation established that the rock was crack cocaine. ***Id.***

¶12 Hodari moved to suppress the evidence. The State of California conceded that the police did not have "reasonable suspicion" under ***Terry*** to justify stopping Hodari. ***Hodari D.***, 499 U.S. at 623 n.1. The issue before the United States Supreme Court was "whether, at the time he dropped the drugs, Hodari had been 'seized' within the meaning of the Fourth Amendment." ***Id.*** at 623.

¶13 The Supreme Court began its discussion with the well-accepted principle that the Fourth Amendment's protection against unreasonable seizures includes seizure of the person. ***Id.*** at 624. However, the Court rejected the notion that the "slightest application of physical force, despite the arrestee's escape" constitutes a "continuing arrest during the period of fugitivity." ***Id.*** at 625 (emphasis omitted). The Court stated, "An arrest requires *either* physical force ... *or*, where that is absent, *submission* to the assertion of authority." ***Id.*** at 626. Since Hodari had cast away the cocaine before he was apprehended and since he had not yielded to the police show of authority prior thereto, the Court concluded the cocaine was not the fruit of a seizure. ***Id.*** at 629. Thus, after ***Hodari D.***, the focus is no longer on the legality of the police conduct; rather, the focus is on the conduct of the suspect in response to the police conduct.

¶14 In so ruling, the Supreme Court rejected Hodari's argument based on the holding of ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980): "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *See* ***Hodari D.***, 499 U.S. at 627 (quoting ***Mendenhall***). ***Hodari D.*** interpreted this language as follows:

"[***Mendenhall***] says that a person has been seized 'only if,' not that he has been seized 'whenever'; it states a *necessary*, but not a sufficient, condition for seizure ...." ***Hodari D.***, 499 U.S. at 628.[5]

¶15 The Wisconsin Supreme Court adopted the ***Hodari D.*** standard in ***State v. Kelsey C.R.***, 2001 WI 54, 243 Wis. 2d 422, 626 N.W.2d 777:

> Not all police-citizen encounters are seizures. ***Florida v. Bostick***, 501 U.S. 429, 434 (1991) (citing ***Terry v. Ohio***, 392 U.S. 1, 19, n.16 (1968). A seizure occurs "when an officer, by means of physical force or a show of authority, restrains a person's liberty." ***State v. Harris***, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996) (citing ***Terry***, 392 U.S. at 19, n.16). *Included in this test for a seizure is the requirement that when a police officer makes a show of authority to a citizen, the citizen yields to that show of authority.* ***California v. Hodari D.***, 499 U.S. 621, 626 (1991).
>
> ....
>
> We agree with the State and will follow the ***Hodari D.*** standard for when a seizure occurs.

***Kelsey C.R.***, 243 Wis. 2d 422, ¶¶30, 33 (emphasis added).[6]

¶16 Here, as in ***Hodari D.***, the police did not apply any physical force against Young prior to the actual capture. Also like ***Hodari D.***, Young did not submit to the police show of authority when Alfredson detained the vehicle and later ordered Young to return to the vehicle. Instead, Young initially walked away

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[5] The majority opinion in ***Hodari D.*** drew a sharp dissent, *see* ***id.*** at 629-48 (Stevens, J., dissenting), particularly regarding the majority's interpretation of this language from ***Mendenhall***, *see* ***Hodari D.***, 499 U.S. at 637-42.

[6] Although adopting ***Hodari D.***, much of the supreme court's ruling justifying the police apprehension of the subject in ***Kelsey C.R.*** rested on different grounds—the community caretaker role of the police. ***State v. Kelsey C.R.***, 2001 WI 54, 243 Wis. 2d 422, ¶¶34-37, 626 N.W.2d 777.

from the scene and later fled by running after Alfredson ordered him to return to the vehicle. Given those facts, ***Hodari D.*** precludes Young from raising his Fourth Amendment claim that Alfredson illegally detained the vehicle under ***Terry***.

¶17 Young tries to distinguish ***Hodari D.*** on the basis of the degree of flight present in the two cases. In ***Hodari D.***, the youths fled immediately upon seeing the police. Here, Young exited the vehicle, began to walk away, and did not run until after Alfredson ordered him back into the vehicle. But that subtle difference in the facts does not permit us to evade the core holding of ***Hodari D.*** that a suspect who does not submit to the show of police authority in an illegal ***Terry*** stop will not be heard to assert a Fourth Amendment violation or rewarded with an order suppressing evidence obtained as the result of such claimed violation.

¶18 Although not argued by Young, we have also considered a further distinction between ***Hodari D.*** and this case. Hodari threw the cocaine away moments *before* the police captured him, whereas Young rid himself of the coat containing the drugs *during* the capture. However, we do not think the application of the Fourth Amendment should turn upon such temporal hairsplitting that allows for the admission of evidence discarded at a certain moment, but requires suppression of evidence discarded a split second later. Instead, it is the core holding of ***Hodari D.*** that governs this case: unless the suspect has yielded to the show of police authority, thereby producing a seizure under the Fourth Amendment, the suspect will not be heard to argue for suppression of evidence as a remedy for an illegal ***Terry*** detention. Here, as in ***Hodari D.***, Young failed to so yield, resulting in a pursuit that prompted him to discard the contraband. Under

those circumstances, ***Hodari D.*** holds that the illegal police conduct under ***Terry*** does not bar the introduction of evidence resulting from the ensuing pursuit.

¶19 Although we uphold the trial court order denying Young's motion to suppress, we add that we are less than enthusiastic about the result that ***Hodari D.*** mandates in this case. The Supreme Court has recognized the right of a person to walk away from an encounter with a police officer that is not supported by probable cause or reasonable suspicion.

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. *The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and* ***may go on his way****. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.*

***Florida v. Royer***, 460 U.S. 491, 497-98 (1983) (emphasis added).

¶20 However, after ***Hodari D.***, this supposed right to "go on his way" becomes an empty right because it vests the police with the authority to pursue and detain anew. In short, the person is penalized for legal conduct while the police are rewarded for illegal conduct.

¶21 True, the suspect does not have the benefit of a judicial declaration regarding the validity of the police conduct at the moment of the encounter, but neither do the police. Moreover, the suspect also faces serious consequences if the

decision to walk away proves flawed. Not only will any evidence subsequently discovered be admissible, but also, as evidenced by this case, the suspect could well face charges for obstructing an officer and resisting an officer.

¶22 However, ***Hodari D.*** saw it otherwise:

> Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed.

***Hodari D.***, 499 U.S. at 627.

¶23 Remembering that Young was also convicted of resisting an officer and obstructing an officer pursuant to WIS. STAT. § 946.41(1), the ***Hodari D.*** approach also seems to fly in the face of established Wisconsin law governing these two crimes. Both crimes require the State to prove as an element that the officer was "doing any act in an official capacity and with lawful authority." WIS. STAT. § 946.41. "Lawful authority" goes to the question of whether the officer's actions "are conducted in accordance with the law." ***State v. Barrett***, 96 Wis. 2d 174, 181, 291 N.W.2d 498 (1980). *See also* WIS JI—CRIMINAL 1765. Therefore, if an officer is acting outside the law, such activity constitutes a defense to the charge of resisting or obstructing an officer. If a defendant's resistance to an officer is excused under those circumstances, we are left to wonder why a

defendant may not rely on similar police conduct to assert a suppression of evidence claim based on a Fourth Amendment violation.[7]

¶24 We observe that ***Hodari D.*** has inspired much criticism.[8] *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3(d), at 124-32 (3d ed. 1996). One commentator has stated that the decision represents a manifestation of the Supreme Court's "'surreal and Orwellian' view of personal security in contemporary America." ***Id.*** at 125 (citing Ronald J. Bacigal, *The Right of the People to be Secure*, 82 Ky. L.J. 145, 146 (1993)). LaFave also says that ***Hodari D.*** erroneously assumes that the common law determines the outer boundaries of the Fourth Amendment and that it fails to address other Supreme Court decisions more on point. LAFAVE, *supra,* § 9.3(d), at 125-26. In addition, we have earlier noted that ***Hodari D.*** changes the focus of the inquiry as to whether a seizure has occurred. Under ***Mendenhall***, we inquired whether, given the police conduct, a "reasonable person would have believed that he was not free to leave." ***Mendenhall***, 446 U.S. at 554. Now, under ***Hodari D.***, it is not the police conduct that governs the inquiry; rather it is the suspect's reaction to the police conduct. LaFave agrees: "[W]hat would otherwise be a groundless and thus illegal ***Terry*** seizure becomes conduct totally outside the Fourth Amendment merely because of the suspect's nonsubmission." LAFAVE, *supra*, § 9.3(d), at 128. LaFave also expresses concern that instead of discouraging illegal police conduct,

[7] Young does not raise a sufficiency of evidence argument as to whether Alfredson was acting with lawful authority. Instead, his argument focuses on the trial court's ruling denying his motion to suppress all the evidence garnered as a result of the illegal ***Terry*** detention.

[8] As of this writing, a Westlaw search reveals sixty-five cases that reflect a negative treatment of ***Hodari D.***

***Hodari D.*** may tempt the police to act on mere hunches, thereby inducing flight. LAFAVE, *supra*, § 9.3(d), at 130.[9]

¶25 Finally, the "fine tuning" that ***Hodari D.*** puts on the ***Mendenhall*** test for a seizure is problematic. ***Mendenhall*** said a person is seized "only if," in view of all the circumstances, a reasonable person would have believed that he or she was not free to leave. ***Mendenhall***, 446 U.S. at 554. This test had been universally accepted as a proven and workable measure for determining when a seizure occurs. Contending that it does no violence to ***Mendenhall***, ***Hodari D.*** says that "only if" does not mean "whenever." ***Hodari D.***, 499 U.S. at 628. As a result, according to ***Hodari D.***, ***Mendenhall*** states only a "necessary, but not a sufficient" condition for a seizure. ***Id.*** (emphasis omitted). That refinement of ***Mendenhall*** strikes us as strained and contrived, functionally overruling ***Mendenhall*** without saying so.

¶26 We rarely express our concerns about an opinion we are duty bound to follow, much less a United States Supreme Court opinion, but we question the wisdom and reasoning of ***Hodari D.*** for the reasons set forth above. We offer our thoughts in the hope that the Wisconsin Supreme Court, either in this case or a future case, might take a further look at ***Hodari D.***[10]

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[9] The dissenters in ***Hodari D.*** expressed a related concern: "If carried to its logical conclusion, [the majority opinion] will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering whatever privacy rights they may still have." ***Hodari D.***, 499 U.S. at 646-47 (Stevens, J. dissenting).

[10] We say this fully aware that the Wisconsin Supreme Court has held that "the standards and principles surrounding the Fourth Amendment are *generally* applicable to the construction of [the Wisconsin Constitution]." ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998) (emphasis added). We leave to the supreme court whether this general rule should continue to bind the Wisconsin Constitution to ***Hodari D.***

## CONCLUSION

¶27 Because Young did not yield to the police show of authority at the time of the illegal *Terry* stop, Young is not entitled to complain about the ensuing police pursuit of him, which led to his resisting and obstructing of an officer and the discovery of the drug contraband. We therefore uphold the trial court's denial of Young's motion to suppress and affirm the judgments of conviction.

*By the Court.*—Judgments affirmed.

Recommended for publication in the official reports.

outcome of the suppression motion for Charles Young because the deadline for the offer was last week, January 15th.

THE COURT: Well, whatever Mr. Young wants to do is fine; but if he wants to go to trial, it won't be today.

MS. CERVERA: So the Flaga cases would be taking priority?

THE COURT: Yes. They brought him down from the prison system.

MS. CERVERA: Yes. I understood differently. I understood it would take priority over the Flaga case because he's in custody.

THE COURT: Mr. Flaga is doing a 30-month sentence.

MS. CERVERA: Yes.

THE COURT: Let's take the suppression motion, and then we will move on from there.

MS. CERVERA: Okay. Thank you. The State is going to call Officer Alfredson.

OFFICER DAVID ALFREDSON,

being first duly sworn to tell the truth, the whole truth, and nothing but the truth testified as follows:

THE COURT: State your name, and spell your last name.

OFFICER ALFREDSON; Officer David Alfredson,

A-l-f-r-e-d-s-o-n.

THE COURT: Proceed.

DIRECT EXAMINATION BY MS. CERVERA:

Q Officer, how are you employed?

A The City of Kenosha Police Department.

Q How long have you been in that line of employment?

A Over seven years.

Q Were you working on October 26th, 2002?

A Yes. I was.

Q Were you working at approximately 11:49 p.m. or at least over that time period?

A Yes. I was.

Q Were you patrolling the area of the 5200 block of 21st Avenue?

A Yes. That was my full assignment, Area 15, which is from 22nd to Lakeshore, Washington to 60th.

Q And how long have you been assigned to that patrol area?

A About seven years.

Q Based on your experience patrolling the area, how would you characterize that area?

A Well, there have always been taverns and nightclubs. In the last couple of years Coins and The Barn have opened up there and become very popular night spots. We have had several complaints from neighbors about people leaving beer bottles in their yards, loud music, being loud and boisterous going

to and from the clubs; so it has became a priority to patrol the area.

Q Have you made stops in the area in the past?

MR. MICHEL: Objection, relevance.

THE COURT: The witness may answer.

A Yes. I have.

Q And what kind of stops have you made in that area?

A As I am patrolling the area, I look for those kind of things, occupied vehicles--

MR. MICHEL: I will object. This is a fishing expedition, having made stops, what type of stops.

THE COURT: What is the relevance of whether he's made stops?

MS. CERVERA: He's going into the types of stops he made in the past which goes to part of his suspicion for making a stop on this date.

THE COURT: You may proceed.

A As I'm patrolling the area specifically around the taverns, I'm looking for occupied vehicles occupied for a length of time. I'll drive by and come back a little while later, a couple of minutes, five minutes. If it's still occupied, I'll stop and check the vehicle to see if people are drinking in the vehicle, narcotics, loud music, if they are playing the stereo too loud.

Q Can you estimate the number of stops you have made within

the recent year involving these types of things?

A Dozens.

Q And I will turn your attention back to the time and date that I mentioned earlier, did you observe anything that caught your attention on October 26th at approximately 11:49 p.m. while you were patrolling that area?

A I had made a pass down 21st Avenue and going from 52nd down to 53rd, and I noticed an occupied vehicle with Illinois plates parked on the east side of the road occupied by about five people. I had passed it and went around the corner and back and stopped in front of The Barn--there was several arguments going on--and basically told them knock it off, and they separated and went their separate ways. I continued back around, looked and saw the same vehicle was still sitting there occupied.

Q Where exactly was the vehicle located as far as landmarks? What was in the nearest-- I'm trying to get into where exactly it was situated.

A It was parked basically on the west side of the road probably in front, well, on the side of the house. There's a house with a sidewalk right there, situated right there in front of that, parked there.

Q And what are the surrounding streets?

A Between 52nd and 53rd.

Q And it was parked right on 21st Avenue I think you stated?

A Right.
Q And you said you went and took care of an incident that occurred at the bar?
A Yes.
Q And you returned to the area?
A Yes.
Q Approximately how much time has passed?
A Five minutes or so, five to ten minutes. I'm not sure. I stopped and talked to these guys, and they went their separate ways.
Q Approximately how many times did you pass this vehicle prior to its catching your attention?
A It caught my attention the one time I noticed it. It was that time, and I went around the block and walked with people at the bar; and I could tell it was still occupied, and that's when I stopped it.
Q What was it about the vehicle that caught your attention?
A It was still occupied with five people in it. That length of time, they would have had time there to park and go out somewhere. They would have more than enough time to go out and do that, so it arose my suspicion for possible drinking or narcotics; so I'll stop and check it out.
Q And what did you do once you returned and observed that the vehicle was still occupied?
A I couldn't pull directly behind the vehicle. I was in the

roadway still, so I illuminated the car with my speed light. I hit my flashing lights because I was in the roadway still, and I started-- I advised Dispatch of my location and the place of the vehicle.

Q And after you notified Dispatch of that, what happened next?

A The back passenger door opened up. I got out of my squad, and a black male got out of the vehicle. I ordered him back into the vehicle. He turned and started walking away from the vehicle. I then yelled louder. I said, "Get back in that car right now." And I started heading toward him around my squad. He turned and looked at me and started running up toward the house directly to the west of him. He ran up to the porch and tried to get into the door. I was able to close up on to him. I grabbed him by the back, and I was able to grab one arm; and I told him to knock it off, stop right here, police. He turned around and looked at me and got his arm out of his coat. I re-secured the arm, and I had him by the collar. I said, "Stop resisting." He continued to struggle. He slipped the coat right off his arm. Now I had previous experience with people taking off their coats when they grab onto something. They'll slip their coat off and continue to run. You're standing there holding the coat. He took his coat off and threw it toward the door. He tried to throw it into the doorway of the house.

Q Was this door open or closed?
A The screen door had been opened by him. I believe the door was-- Maybe someone had come to the door while we were up there. I yelled at them to stay in the house for officer's safety. I was by myself. There were several people around me, and I'm struggling; so I yelled to him to shut the door, and they did shut the door. I believe he had thrown the coat toward it. It caught my attention. It would be kind of weird they would be throwing a coat instead of dropping it to the ground.
Q What happened right after you observed this coat being thrown?
A He pushed off the wall with the hand I didn't have control of, and we backed up on the porch. I was able to direct him down the stairs. We were both still standing. He was trying to pull away from me. We kept going down the stairs. There's about a four-foot cyclone fence that runs alongside that leads up to that back porch. I was able to spin him and get him over the top of the fence to get his feet off the ground and unbalanced. I called for back-up on my radio. It was heavily patrolled, and so the squads weren't too far away. They were there right away. I was able to secure his other hand and get them both cuffed.
Q And what did you-- Is this person that you struggled with here today?

A Yes.
Q I would like for you to identify him for the record.
A It's Charles Young in the blue shirt next to his lawyer at defendant's table.
THE COURT: The record will show the witness has identified the defendant.
Q This location that you're referring to, what municipality is it in?
A City of Kenosha.
Q Kenosha County?
A Yes.
Q And once you were able to handcuff the defendant, the person you identified as the defendant, what did you do after that?
A A couple of officers arrived on the scene, and I turned and told one of them to go and get the coat immediately. He had caught my suspicion when he threw it. They went up and secured the coat. It was still laying in the front porch. The other officer helped me bring Charles to the squad car. I placed Charles in the back of the squad car. The officer put his coat on the hood of my squad. I searched the coat and searched Charles before I put him in the squad car. In the right front pocket of the coat I found a container. It's like the small glass container like hobby paints come in. When I opened it, I believed what was in there was marijuana. It had that smell and texture of it. I later

tested that. It tested positive for THC with the NIK test field-test kit.

Q And once you found that item and realized that you thought it was possibly marijuana, what did you do at that time with the items?

A I placed them, the coat and the marijuana, into evidence in the Kenosha Safety Building.

Q Did you transport the defendant to the jail?

A Yes. I did.

Q Was anyone else with you at the time of transport?

A No.

MS. CERVERA: I have nothing further.

THE COURT: You may cross-examine.

MR. MICHEL: Thank you, your Honor.

CROSS-EXAMINATION BY MR. MICHEL:

Q First of all, Officer Alfredson, you testified that you made numerous stops in the area when you see individuals in their car for over five to ten minutes?

A Well, I don't have a set time. If I pass a car and it's occupied and I travel along and come back again and it's still occupied by the same people, I stop and investigate it.

Q And in all these investigations, have you always found marijuana, drugs, alcohol?

A No.

Q When you initially saw the vehicle, you stated that you drove by it. At that point it didn't rise to the level that you believed you should call it in, run the plates, anything like that?
A I noticed an Illinois plate not familiar to the area to me. You kind of know whose car people it is of people who live there.
Q You have testified there's two taverns in the area?
A Yes, sir.
Q It is popular, so it could be other patrons from Illinois that come to it?
A Sure.
Q And once you drive around the block you testified that you talked to some other individuals on the corner?
A I actually went around actually onto 52nd, in the 2100 block on 52nd where I stopped the two people actually across from the park; and they were having a heated exchange. It wasn't physical. They were yelling back and forth, and I pulled my squad right up to them and got out and told them to knock it off. They were both cooperative. They said okay, no problem, we're buddies, we know each other. I said, "You walk that way. You walk that way." They both complied.
Q You were driving on 21st Avenue past the vehicle. That's where you passed the vehicle?
A The vehicle that I stopped, yes, that was on 21st Avenue.

Q 21st is a very narrow road?
A Yes.
Q It's your testimony there were cars parked on the side, so you were in the middle?
A Yes. I was in the roadway. I couldn't pull behind the vehicle because cars were parked behind it.
Q And at that point the only thing you noticed were there were five individuals in the vehicle when you passed it?
A The first time, yes.
Q When you came back, there were still the same five individuals?
A Yes. There were still five people in it. If the people changed, I wouldn't know.
Q And this was in November, correct?
A Yes.
Q Do you recall when the stop was?
A No. I didn't look at my report on what date it was. I thought it was in October. Okay.
Q You also testified that there were calls in that area regarding bottles left in the yards?
A Yes, several complaints. In fact, both cars have people come out after the night. I know Coins does and The Barn has it. They'll walk around the area, because there's been so many complaints, picking up bottles. They actually make sweeps when the bar is closed to try to minimize the amount

of complaints they get.

Q That night you hadn't receive any phone call; do you recall?

A No. I am assigned-- I have actually received memos and have been assigned to be in that area and take care of any complaints. It's been a hot spot for the last couple of years.

MR. MICHEL: No further questions of this witness.

THE COURT: Anything further?

MS. CERVERA: Nothing further.

THE COURT: Thank you, sir. You may step down.

Do you have anything further?

MS. CERVERA: Well, yes. I would ask that the Court deny the--

THE COURT: Let's see if the defense has anything it wishes to offer?

MR. MICHEL: We have nothing we wish to offer at this time.

MS. CERVERA: I'm sorry. Nothing further. Is it time for argument?

THE COURT: Now, if you wish to make any statement, go ahead.

MS. CERVERA: Yes. I do. Thank you. I would ask that the Court deny the defense's motion to

suppress the evidence that was eventually found by Officer Alfredson. As he testified, he's been in this area. He knows the area. He's been patrolling it for seven years approximately. There is bars that are located very near to this area. He knows that there is often drug use or alcohol consumption in vehicles. He saw five people in the car. This was suspicious to him. It caught his attention. At first he goes and takes the call and comes back. He realizes the people are still in there. There are Illinois plates on the car, so he's going to check it out especially knowing the area and being assigned to there. He's conducting an investigatory stop to look into what he considers to be suspicious behavior under the circumstances that existed at that time.

State v. Waldner--I have a copy which I intended to provide to the Court, and I will do so--actually indicates that suspicious activity may often be ambiguous and sometimes even lawful activity. Being parked in this case is lawful activity. Having five people in the car is usually considered to be lawful, but the circumstances of the situation, the fact that Officer Alfredson knows there's illegal conduct that takes place in vehicles in this area at this time of night, he's driving by on Saturday. He finds that he has to make these stops to insure the safety of the neighborhood and to prevent that kind of activity from

continuing. State v. Waldner, as I mentioned, 206 Wis. 2d 51, a 1996 case, the Court stated that this suspicious conduct is by its nature very ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity. It quotes Anderson at 155 Wis. 2d at 84. The police officer observes lawful but suspicious conduct; but, if a reasonable inference of unlawful conduct can be objectively discerned, not withstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry. I think that's what we have here.

The officer also testified that as soon as he made this stop he observed the defendant exit the vehicle and begins to flee essentially. Illinois v. Ward, though I didn't have an opportunity to bring a copy of that case, but that cite is 120 Supreme Court 673, a 2000 case, the Court explained that or stated that unexplained flight can in itself be reasonable suspicion to justify flight. Once he had made the stop the officer had more right, more of a right, to pursue this matter and find out what exactly was going on and continue his investigation.

Based on the testimony, I would ask that the Court deny the defense's motion to suppress.

THE COURT: Mr. Michel.

MR. MICHEL; I'm outraged. First of all, counsel has just admitted sitting in a vehicle is an ordinary occurrence that normal people do. Clearly in State v. Young, 212 Wis. 2d 417, the Court states that conduct that large numbers of innocent citizens engage in everyday for whole innocent purposes, even in residential neighborhood where drug trafficking occurs is normal behavior. We cannot allow enforcement to bust into cars if they see people sitting in their cars.

THE COURT: He didn't' bust into the car. He stopped it, put the light on, and detained them.

MR. MICHEL: No.

THE COURT: Yes. He told them to stay in the car.

MR. MICHEL: He stopped the vehicle.

THE COURT: No. The vehicle was stopped.

MR. MICHEL: He came up behind it and put his light on it. It's a detainment under Young. A brief investigatory stop is seizure and is therefore subject to requirement of Fourth Amendment that all searches and seizures be reasonable.

What I'm saying is what Officer Alfredson is doing is illegal by stopping these cars, pulling up next to them, and doing a search clearly just because they sit in their car for a period over five to ten minutes. There's no basis

for it, and it is outrageous. This is a neighborhood, I understand, that with his training-- He's been on the force for seven years. It's known for drug activity, but clearly just from what is on this record it does not give rise to reasonable suspicion. I understand that reasonable suspicion is a small burden. It's not up to this level of probable cause, but there still has to be factors that are sufficient to give rise to the reasonable, articulible suspicion of criminal activity that justifies intrusion. He's testified all of his stops have not come across with alcohol or with drugs or with anything like that, and what I'm saying is that he did stop this vehicle.

Counsel has brought up the fact that my client left when he was told to stop, but clearly that is the root of the poisonous tree. That's past the actual stop of this vehicle. I'm asking that the evidence be suppressed due to the fact there was an illegal search.

THE COURT: The Court has heard the testimony, and the Court agrees with defense counsel. The Court believes that based upon the officer's experience of what has occurred in the area, the officer had the right to make an investigatory stop as it were, ask the people, given the fact that they had remained in the car for a long time. Certainly had the defendant not left the vehicle the officer could have done nothing, just checked the vehicle out, who

is in it, but had no right to arrest anyone at that point. The officer has had problems in that area before, and he is simply acting in a reasonable manner under the circumstances given the time of night which I believe was late, late night, given the area, given what he knows of the area. Had the defendant stayed in the vehicle the officer could have done nothing given the fact that the officer had the right to approach the vehicle and ask what was going on, what they were there for, but at that point nothing further. Once the defendant left the vehicle and refused to cooperate with the officer, refused to follow the officer's orders, I think the officer had the right to go further and eventually search the clothing as he did.

The Court will deny the motion to suppress on the basis of an illegal arrest, and the matter will proceed further on.

MR. MICHEL: The only thing is I want the record to clarify that the date you mentioned, the time-- but I believe it also occurred on a Saturday.

THE COURT: Saturday night. All right. I don't know whether you wish to discuss this matter further with your client.

MR. MICHEL: Your Honor, the only thing is what I want to make note of on the record also is regarding the offer the State had made. I understand they retracted

STATE OF WISCONSIN

IN SUPREME COURT

No. 2003AP2968-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES E. YOUNG,

Defendant-Appellant-Petitioner.

REVIEW OF DECISION OF COURT OF APPEALS, DISTRICT II, AFFIRMING JUDGMENTS OF CONVICTION ENTERED IN CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE MICHAEL S. FISHER, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

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# BRIEF OF PLAINTIFF-RESPONDENT

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By virtue of the supreme court granting the petition for review, the case merits oral argument and publication of the opinion.

## SUPPLEMENTAL STATEMENT OF FACTS

The state will supplement the facts reported in the Brief of Petitioner at 4-7. The supplemental facts will

come from testimony at the preliminary hearing as well as from the trial.[1]

Kenosha Police Officer David Alfredson had patrolled the area for about seven years where the car carrying Charles Young was parked (45:5; Pet-Ap. 115). Alfredson said the area had had problems with fights, with drinking in cars and with drug use outside the Barn and the Coins (42:4). He said neighbors had complained about people being loud, throwing beer bottles, drinking in their cars and doing drugs in the area (45:61-62).

When he first saw the car in which Young was a passenger, Alfredson noticed the car had Illinois license plates not familiar to the area (45:13; Pet-Ap. 123). He said you kind of know the cars of the people who live there (45:13; Pet-Ap. 123).

Alfredson stopped his marked patrol car in the roadway because cars were parked behind Young's car (42:11; 45:8, 14; Pet-Ap. 118, 124). He said he parked his squad car almost parallel with the car directly behind Young's car (45:64).

Alfredson illuminated Young's car with a spotlight (45:9, 63; Pet-Ap. 119). Because he was still in the roadway, Alfredson turned on his flashing lights (45:9, 63; Pet-Ap. 119). Alfredson explained: "I put my flashers on.

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[1]In reviewing an order on a motion to suppress, the appellate court may take into account evidence from the preliminary hearing and the trial as well as the evidence from the suppression hearing. *State v. Mazur*, 90 Wis. 2d 293, 304-05, 280 N.W.2d 194 (1979); *State v. Begicevic*, 2004 WI App 57, ¶3 n.2, 270 Wis. 2d 675, 678 N.W.2d 293; *State v. Gaines*, 197 Wis. 2d 102, 106-07 n.1, 539 N.W.2d 723 (Ct. App. 1995); *State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995); *State v. Truax*, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989); and *State v. Griffin*, 126 Wis. 2d 183, 198, 376 N.W.2d 62 (Ct. App. 1985), *aff'd*, 131 Wis. 2d 41, 388 N.W.2d 535 (1986), *aff'd*, 483 U.S. 868 (1987). The preliminary hearing testimony is in document 42. The suppression hearing and the trial are reported in document 45 with the suppression hearing appearing on pages 3 to 20.

They blink on the sides. They don't have the overhead emergency rollers going all the way" (45:64). Alfredson said he "had the flashers on. I didn't have the full emergency lights, just the flashers" (45:78).

Alfredson said he attempted to make contact with the people in the car to see what they were doing in the vehicle for that length of time (45:63). Alfredson said he stopped and shined the light into the car because five individuals had been in the car for over five to ten minutes in an area that had had a lot of problems (45:80). Alfredson said: "Generally, people don't sit in their car that long" (45:80).

Alfredson testified that, when he illuminated the car, the back passenger-side door opened and a black male got out (45:65). Alfredson got out of his car and ordered the person back into his vehicle (45:65). Alfredson said the male, later identified as Young, disregarded him and turned and took two nonchalant steps like he did not hear Alfredson (45:65). Alfredson said he yelled very loudly: "[S]top, get back in the vehicle" (45:65). After that, Young looked at Alfredson in uniform and ran toward the house with Alfredson in pursuit (45:61, 65, 79).

The Petitioner's Brief at pages 5-6 describes the struggle between Alfredson and Young and the seizure of the drugs from Young's coat.

The defense called Michelle Johnson as a witness at the trial (45:95). Johnson had been sitting in the middle of the backseat of the car with Young next to her; and three other people were in the car (45:95-97). Johnson said the police car was by the rear of the car she was in (45:98). Johnson said the spotlight was shining on the car she was in but the police car "didn't have no sirens on or anything" (45:98, 102). Johnson could not remember if the police car had any other lights on (45:98).

Johnson recalled Young getting out of the car and she said nothing unusual occurred when he left the car

(45:97). Johnson did not see law enforcement doing anything until Young got on the porch of the house and then she saw the police running to the porch (45:97). Johnson said she and the others got out of the car right after Young got out of the car (45:97-98, 102).

## ARGUMENT

### I. THIS COURT SHOULD REAFFIRM THE HOLDING IN *STATE V. KELSEY C.R.* THAT ADOPTED THE *CALIFORNIA V. HODARI D.* STANDARD FOR DETERMINING WHEN A PERSON IS SEIZED UNDER ART. I, § 11 OF THE WISCONSIN CONSTITUTION.

#### A. Charles Young asks this court to overrule the decision in *State v. Kelsey C.R.* to adopt the *California v. Hodari D.* standard for determining when a person is seized under art. I, § 11 of the Wisconsin Constitution.

In *California v. Hodari D.*, 499 U.S. 621, 626 (1991), the Court held that a person is seized within the meaning of the Fourth Amendment either by a law enforcement officer's application of physical force or by the person's submission to the officer's show of authority.

In *State v. Kelsey C.R.*, 2001 WI 54, ¶¶29, 33, 243 Wis. 2d 422, 626 N.W.2d 777, this court held that it would follow the *Hodari* standard for determining when a seizure occurs under art. I, § 11 of the Wisconsin Constitution.

Charles Young asks this court to overrule its adoption of the *Hodari* standard in *Kelsey C.R.* and to hold that a person is seized "'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'"

Brief of Defendant-Appellant-Petitioner at 23, quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Young argues that the court should reject the *Hodari* test because it "improperly focuses the attention on the citizen's actions rather than the actions of law enforcement, and because it fails to recognize the substantial interference with personal liberty caused by pursuit or attempted arrest." Brief of Defendant-Appellant-Petitioner at 25. Young also contends that the *Hodari* seizure test should be rejected because it is "too radical a change" from the search and seizure law as reflected in the *Mendenhall* test that Wisconsin courts have applied. Brief of Defendant-Appellant-Petitioner at 22-23.

The state requests this court to reaffirm its adoption of the *Hodari* test for determining when a person is seized under art. I, § 11 of the Wisconsin Constitution. Contrary to Young's claim, the *Hodari* test is consistent with the test stated in prior United States Supreme Court cases and the Wisconsin court decisions that applied the *Mendenhall* test. Adoption of the *Hodari* test is consistent with Wisconsin's history of following the United States Supreme Court's interpretation of the Fourth Amendment in construing art. I, § 11 of the Wisconsin Constitution. The policy reasons for the United States Supreme Court's adoption of the *Hodari* test are consistent with Wisconsin policies as reflected in the reasons given by this court in *State v. Hobson*, 218 Wis. 2d 350, 353, 371-80, 577 N.W.2d 825 (1998), for abrogating the common law privilege to resist an unlawful arrest in the absence of unreasonable force.

### B. The *Hodari* test for seizure of a person is consistent with the test stated in *Mendenhall*.

Young traces the test for seizure employed by the United States Supreme Court in a series of cases leading to *Hodari*; and Young then claims that the test in *Hodari*

marked a departure from, and a radical change in, the *Mendenhall* test that Young urges this court to apply in all situations. Brief of Defendant-Appellant-Petitioner at 11-25.

The Texas Court of Appeals in *Johnson v. State*, 864 S.W.2d 708, 722 (Tex. Ct. App. 1993), reviewed the Supreme Court cases leading to *Hodari* and correctly concluded that the test for seizure of a person in *Hodari* is "consistent with preexisting federal constitutional rules determining seizure." The cases before *Hodari* never considered whether the citizen's submission to a show of authority was necessary for a seizure because in all those cases the citizen had either complied with a show of authority or the police conduct had not constituted a show of authority. *Id.* at 721. *Hodari* was the first case in which the Supreme Court "addressed the question of whether an uncomplied-with show of authority resulted in a seizure, and the Court held that it did not." *Id.* at 721.

In *Terry v. Ohio*, 392 U.S. 1, 6-7 (1968), after observing Terry and his companions, Officer McFadden approached the men, identified himself and asked for their names. "When the men 'mumbled something' in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing." *Id.* at 7. After feeling a gun in Terry's coat pocket, McFadden ordered all three men to enter a store and he removed the gun from Terry's pocket and patted down the clothing of the other two men. *Id.* In response to an argument that Terry had not been seized because he had not been arrested, the Court said in *Terry*, 392 U.S. at 16: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." The Court said there was no question that McFadden seized Terry and searched him when McFadden took hold of Terry and patted down the outer surfaces of his clothing. *Id.* at 19.

The Supreme Court explained in *Terry* that not all personal intercourse between policemen and citizens qualifies as seizures of the person and "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry*, 392 U.S. at 19 n.16. Because on the record in that case the Court could not tell whether Terry was seized before McFadden's initiation of physical contact with Terry, the Court assumed that up to that point there had been no intrusion upon constitutionally protected rights. *Id.*

Thus, it should be noted that the statement in *Terry* that a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen" was made in the context of the officer physically touching and restraining Terry from moving.

In *Mendenhall*, 446 U.S. at 547-49, after Mendenhall arrived at Detroit Airport, two DEA agents approached her, identified themselves as federal agents, asked her questions and then asked Mendenhall if she would accompany them to the airport DEA office for further questions. Mendenhall did so. At the office, Mendenhall consented to the search of her handbag and of her person. While disrobing to be searched, Mendenhall handed two small packages of heroin to a policewoman.

In deciding whether Mendenhall's consent was valid, the opinion by Justice Stewart, which was joined by Justice Rehnquist, considered whether the consent came during a consensual encounter between Mendenhall and the officers or whether Mendenhall had been seized prior to the consent. *Mendenhall*, 446 U.S. at 551-57. The government argued that no seizure had occurred. *Id.* at 551 n.5. In that context, the Court adhered "to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *Id.* at 553. Justice Stewart's opinion concluded

> that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

*Mendenhall*, 446 U.S. at 554 (footnote omitted). Justice Stewart's test for seizure was embraced by the Court in *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984). *See Michigan v. Chesternut,* 486 U.S. 567, 573 (1988). As in many decisions, the parties in this case refer to the test as the *Mendenhall* test.

Applying the test, Justice Stewart concluded that Mendenhall had not been seized because nothing in the record suggested that Mendenhall "had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way." *Mendenhall*, 446 U.S. at 555.

Thus, it should be noted that the *Mendenhall* test was drafted and applied in a case where the citizen remained with the officers and the question was whether she remained of her own choice or whether she remained because no reasonable person would have felt free to leave in the face of the officers' show of authority. The issue in the case was whether the conduct of the officers constituted a show of authority. Justice Stewart concluded there was no show of authority because he concluded that a reasonable person would have felt free to leave. In the facts of the case, had Justice Stewart concluded that the police conduct constituted a show of authority, he would have concluded there was a seizure because it was clear that Mendenhall's conduct would have constituted submission to the show of authority.

In *Florida v. Royer*, 460 U.S. 491, 493-95 (1983), two officers approached Royer in the Miami airport and asked to speak to him. Upon request, Royer produced his driver's license and airline ticket. After more questions and observing Royer's conduct, the officers did not return the airline ticket or driver's license but asked Royer to accompany them to a room that was later described as a large storage closet. Without Royer's consent, an officer retrieved Royer's luggage from the airline and brought it to the room. When asked for consent to search the suitcases, Royer produced a key and consented to have a piece of luggage pried open.

The issue addressed in the plurality opinion was whether the consent came during a period of illegal detention. *Royer*, 460 U.S. at 497-502. In response to the government's argument that the entire encounter was consensual, the plurality opinion reviewed the facts, found the government's position untenable and said, quoting Justice Stewart's *Mendenhall* test at the end: "These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.'" *Royer*, 460 U.S. at 501-02.

Thus, the plurality opinion found there was a seizure because the officers' conduct constituted a show of authority. There was no reason to discuss or consider submission to the authority because Royer had complied with the officers' requests and had never attempted to leave.

In *Chesternut*, 486 U.S. at 569-70, the police car was driving alongside Chesternut who was running. The police observed Chesternut discard a number of packets he pulled from a pocket. An officer got out of the car, examined the packets and found pills. Chesternut had stopped after running only a few paces after discarding the packets. Chesternut argued that he had been illegally seized before he discarded the packets. *Chesternut*, 486 U.S. at 567. Applying the *Mendenhall* test, the Court

concluded that Chesternut had not been seized because the police conduct had not even constituted a show of authority. *Chesternut*, 486 U.S. at 573-76. The Court said: "[T]he police conduct involved here would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement." *Id.* at 575.

Thus, the Court in *Chesternut* concluded there was no seizure because there was no show of authority. Because there was no show of authority, there was never a reason to consider whether Chesternut submitted to the show of authority, although on the facts it would have been clear he did because he remained on the scene to be arrested as soon as the officer saw the pills.

In *Hodari*, 499 U.S. at 622-23, when four or five youths huddled around a small red car saw an unmarked police car approaching, they took flight. Hodari and a companion ran through an alley and the car and the other youths went in different directions. The officers were suspicious and gave chase. When Hodari saw that an officer was almost upon him, Hodari tossed away what appeared to be a small rock. A moment later the officer tackled him and handcuffed him. The discarded rock was found to be crack cocaine.

The issue for the Court was whether Hodari had been seized before he dropped the cocaine. *Hodari*, 499 U.S. at 624. Hodari argued that a person is seized when his liberty is in some way restrained by means of physical force or show of authority; and he contended that he was seized before discarding the cocaine because the officer's pursuit qualified as a show of authority calling upon him to stop. *Hodari,* 499 U.S. at 625-26.

The Supreme Court held that a seizure does not occur upon a show of authority unless the subject yields to it. *Hodari,* 499 U.S. at 626. The Court said that the word seizure "does not remotely apply, however, to the prospect of a policeman yelling 'Stop, in the name of the law!' at a

fleeing form that continues to flee. That is no seizure." *Hodari*, 499 U.S. at 626. The Court concluded that a seizure required either the application of physical force or submission to an assertion of authority. *Hodari*, 499 U.S. at 626.

Explaining why the *Mendenhall* test was not used in determining when Hodari was seized, the Court said in *Hodari*, 499 U.S. at 628:

> It [the *Mendenhall* test] says that a person has been seized "only if," not that he has been seized "whenever"; it states a *necessary*, but not a *sufficient*, condition for seizure--or, more precisely, for seizure effected through a "show of authority." *Mendenhall* establishes that the test for existence of a "show of authority" is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.

The Court concluded that, because Hodari was not seized until he was tackled, the cocaine he abandoned while running was not the fruit of a seizure and it was admissible. *Hodari*, 499 U.S. at 629. This case was decided nine years before *Illinois v. Wardlow*, 528 U.S. 119 (2000) (flight can help provide reasonable suspicion to justify a stop), and the state had conceded that the police had no reasonable suspicion to stop Hodari when the officer started chasing him. *Hodari*, 499 U.S. at 623 n.1. The Supreme Court said that Hodari dropping the rock of cocaine just before the seizure provided the reasonable suspicion to justify the seizure. *Hodari*, 499 U.S. at 624.

As noted by the Texas Court of Appeals in *Johnson*, 864 S.W.2d at 721, in *Terry*, *Mendenhall* and *Royer*, "the person claiming to have been seized complied or was physically forced to comply with the police request to stop." In *Chesternut*, "it was not necessary for the Court to reach the issue of whether the defendant was seized even though he did not comply with the alleged show of

authority because, as the Court held, there was no show of authority for him to comply with." *Id.*

Summarizing the cases before *Hodari*, the court said in *Johnson*, 864 S.W.2d at 721:

> These cases demonstrate that the reasonable person test determines whether the officer's show of authority is so coercive that a person's compliance would be deemed involuntary. The test does not purport to hold that the show of authority necessarily results in a seizure. Such a holding was unnecessary because, prior to *Hodari,* the suspects in the cases complied with the show of authority.

Describing how *Hodari* fit with the prior Supreme Court decisions, the court said in *Johnson*, 864 S.W.2d at 721-22:

> In *Hodari,* the Court finally addressed the question of whether an uncomplied-with show of authority resulted in a seizure, and the Court held that it did not. In *Hodari,* the Court applied a two-prong test to determine whether a suspect was seized. First, the court must determine whether, applying the reasonable person test, the police conduct constituted a *Mendenhall* show of authority, *i.e.,* conduct such that, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall,* 446 U.S. at 544, 100 S.Ct. at 1877. If the officer's conduct constitutes a *Mendenhall* show of authority, the court must next determine whether this conduct had an actual coercive physical effect on the suspect, *i.e.,* did the suspect comply with the officer's command. If so, then the person was seized. In *Chesternut,* the first prong was not met, so it was not necessary for the Court to consider the second prong. In *Hodari,* the Court assumed that the first prong was met, but it found that the second prong was not met.

The court in *Johnson*, 864 S.W.2d at 722, explained why *Hodari* was consistent with the prior Supreme Court decisions on seizure: "*Hodari* did not change the preexisting rule for determining seizure; the Court had always assumed the second prong because the suspects

had all complied or been forced to comply. Contrary to some commentators on the law, we read *Hodari* as consistent with preexisting federal constitutional rules determining seizure."

In *State v. Agundis*, 903 P.2d 752, 757 (Idaho Ct. App. 1995), the court also concluded that *Hodari* was not inconsistent with the *Mendenhall* test since *Mendenhall* had not held that a person who disregarded a law enforcement officer's show of force was nonetheless seized simply because a reasonable person would have submitted to the officer's commands. In *Tom v. Voida*, 654 N.E.2d 776, 783 (Ind. Ct. App. 1996), the court described *Hodari* as further refining the rule laid out in *Mendenhall*.

For the reasons given in the *Johnson* decision, the *Hodari* test should not be viewed as inconsistent with or a departure from the *Mendenhall* test for seizure of a person. The *Hodari* case dealt with a situation that had not arisen in the prior cases, that situation being that the citizen fled from the officer's show of authority. The test for seizure announced in *Hodari* applies to the different situation that was not considered in the prior cases.

Without discussing all the differences, the Wisconsin Court of Appeals recognized in *State v. Stout*, 2002 WI App 41, 250 Wis. 2d 768, 641 N.W.2d 474, that the *Hodari* and the *Mendenhall* tests simply apply to different situations. The state wanted the court to apply the *Hodari* test to determine whether Stout was seized as soon as the officer stood in the doorway blocking the entrance to the room. *Stout*, 250 Wis. 2d 768, ¶19. The court disagreed with the state and applied the *Mendenhall* test after Stout argued that the *Hodari* test did not apply since he had not attempted to flee. *Stout*, 250 Wis. 2d 768, ¶¶19-20. The distinction between the *Mendenhall* test and the *Hodari* test that was made in *Stout* was also made in *State v. Morris*, 72 P.3d 570, 578 (Kan. 2003), where the court said that the *Hodari* rule was "intended to address cases where a defendant, after a show of authority, does not

yield to the officer's authority but takes other action, such as abandoning evidence or fleeing, before finally submitting to the officer's show of authority."

Therefore, this court should view *Hodari*'s test for seizure of a person as consistent with the *Mendenhall* test and recognize that the two tests apply to different situations.

### C. Textual, historical and policy reasons dictate that this court should reaffirm the adoption of the *Hodari* standard for determining when a person is seized under art. I, § 11 of the Wisconsin Constitution.

#### 1. Courts examine several criteria to determine whether a state constitution should be interpreted the same as the United States Constitution.

Among the criteria courts use to decide whether their state constitutions should be interpreted the same as the United States Constitution are the similarity of the texts of the corresponding provisions in the two constitutions, the protections afforded by the corresponding provisions, the state's history in construing its constitution relative to the United States Constitution and the similarities or differences of state and federal policies promoted by the interpretations of the two constitutions. *State v. Pitsch*, 124 Wis. 2d 628, 646, 369 N.W.2d 711 (1985); *Jones v. State*, 745 A.2d 856, 864-56 (Del. 1999); *Commonwealth v. Matos*, 672 A.2d 769, 772 n.3 (Pa. 1996); *State v. (Kevin) Young*, 957 P.2d 681, 686 (Wash. 1998).

An application of the above criteria dictates that this court reaffirm the adoption of the *Hodari* test to determine whether a person is seized under art. I, § 11 of the Wisconsin Constitution.

2. The texts of art. I, § 11 and the Fourth Amendment are virtually identical.

The text of art. I, § 11 of the Wisconsin Constitution is virtually identical to the Fourth Amendment. *State v. Fry*, 131 Wis. 2d 153, 171-72, 388 N.W.2d 565 (1986).

"[W]here the language of the state constitutional provision at issue is virtually identical with that of its federal counterpart, as here," this court has traditionally interpreted the Wisconsin Constitution consistent with the protections of the federal constitution as interpreted by the United States Supreme Court. *State v. Tompkins*, 144 Wis. 2d 116, 133, 423 N.W.2d 823 (1988). This is particularly true of this court's interpretation of the Wisconsin search and seizure provision. *Id.*

As pointed out in *Tompkins*, the fact that the corresponding state and federal search and seizure provisions are worded virtually the same is a reason to have the same test for a seizure of a person under the Wisconsin Constitution as under the Fourth Amendment. Other courts adopting the *Hodari* test for their state constitutions have also pointed out that the corresponding provisions are worded the same or almost the same. *Agundis*, 903 P.2d at 756 (text of Idaho Constitution is nearly identical to Fourth Amendment); *Henderson v. State*, 597 A.2d 486, 488 (Md. Ct. Spec. App. 1992) (Maryland Constitution similar to Fourth Amendment); *State v. Cronin*, 509 N.W.2d 673, 675 (Neb. Ct. App. 1993) (corresponding provision of Nebraska Constitution is textually identical to Fourth Amendment); *Johnson v. State*, 912 S.W.2d 227, 232 (Tex. Crim. App. 1995), *affirming* 864 S.W.2d 708 (Tex. Ct. App. 1993) (no substantive difference between Texas Constitution and Fourth Amendment).

### 3. The Wisconsin Supreme Court consistently conforms the Wisconsin Constitution to the Fourth Amendment.

This court has consistently and routinely conformed the law of search and seizure under the Wisconsin Constitution to that developed by the United States Supreme Court under the Fourth Amendment. *See State v. Sykes*, 2005 WI 48, ¶13, __ Wis. 2d __, __ N.W.2d __; *State v. Ward*, 2000 WI 3, ¶55, 231 Wis. 2d 723, 604 N.W.2d 517; *State v. O'Brien*, 223 Wis. 2d 303, 316-17, 588 N.W.2d 8 (1999); *State v. Phillips*, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998); *State v. Richards*, 201 Wis. 2d 845, 850-51, 549 N.W.2d 218 (1996); *Tompkins*, 144 Wis. 2d at 131; *Fry*, 131 Wis. 2d at 172.

Other courts adopting the *Hodari* test for their state constitutions have also noted that they have a history of interpreting their state constitutions to have the same meaning as the Fourth Amendment. *Henderson*, 597 A.2d at 488; *Cronin*, 509 N.W.2d at 676.

In an effort to overcome Wisconsin's history of construing art. I, § 11 in conformity with the law developed under the Fourth Amendment, Young cites two cases where he claims Wisconsin law provided citizens greater protection than the United States Constitution does. Young cites *State v. Hansford*, 219 Wis. 2d 226, 242-43, 580 N.W.2d 171 (1998), for holding that the Wisconsin Constitution guarantees the right to a twelve-person jury trial in misdemeanor cases even though the federal constitution does not; and he cites *State v. Dyess*, 124 Wis. 2d 525, 534, 370 N.W.2d 222 (1985), for relying on state law to conclude that a jury instruction denied the defendant a substantial right without considering whether the instruction violated the United States Constitution. Brief of Defendant-Appellant-Petitioner at 10.

Neither case supports Young's argument that art. I, § 11 of the Wisconsin Constitution should be construed

differently from the Fourth Amendment. In *Hansford*, 219 Wis. 2d at 242-43, the court relied on the "history surrounding the adoption of the Wisconsin Constitution, and the long-standing precedent of this court interpreting the meaning of the right to trial by jury under our constitution" to find that the Wisconsin Constitution provided citizens greater rights than the United States Constitution. As described above, the history and long-standing precedent of this court interpreting art. I, § 11 of the Wisconsin Constitution is to construe it in conformity with Fourth Amendment law. Therefore, the rationale employed in *Hansford* supports the state's argument that in this case, consistent with history and precedent, art. I, § 11 should again be construed in conformity with Fourth Amendment law.

In *Dyess*, 124 Wis. 2d at 533-34, because the court found that the defendant was entitled to relief under a statute, the court never reached the question of the validity of the jury instruction under the United States Constitution. The fact that the defendant in *Dyess* was entitled to relief under a statute not relevant to this case does not support Young's claim that the Wisconsin Constitution should be interpreted to provide greater protection than the Fourth Amendment.

In summary, Wisconsin's history of construing art. I, § 11 to conform to the law developed by the United States Supreme Court under the Fourth Amendment provides another reason for having the same test for a seizure of a person under the Wisconsin Constitution as under the Fourth Amendment.

4. Article I, § 11 protects the same interests as the Fourth Amendment.

In *Fry*, 131 Wis. 2d at 172, 174, this court pointed out that the standard and principles surrounding the Fourth Amendment are generally applicable to the construction of

art. I, § 11, and that the two provisions are intended to protect the same interests. This court was "unconvinced that the [United States] Supreme Court provides less protection than intended by the search and seizure provision of the Wisconsin Constitution." *Fry*, 131 Wis. 2d at 174.

The history of Wisconsin's art. I, § 11 is similar to the history of the Texas Constitution's search and seizure provision, which the Texas Court of Criminal Appeals concluded showed that the Texas provision was intended to protect the same interests as the Fourth Amendment. As was the Texas constitutional provision, art. I, § 11 was adopted before the Fourth Amendment was made applicable to the states in *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). When the two state constitutions were adopted, the only way to protect citizens from state actions in the same way they were protected from federal authority was through state provisions. *Johnson*, 912 S.W.2d at 233. In light of those circumstances, the court said in *Johnson*, 912 S.W.2d at 233-34:

> It is not unreasonable to conclude from these facts that the framers of the Texas Constitution chose to draft Art. I, § 9 to protect Texas citizens from unreasonable searches and seizures by the state in the same way they were protected from unreasonable searches and seizures by the federal government. If they had intended to grant to citizens greater protection from state actions than they enjoyed from federal actions, then they could have drafted Art. I, § 9 at that time to reflect that intent.

Article I, § 11 of the Wisconsin Constitution was part of the declaration of rights drafted by the constitutional convention in 1847-48. As originally introduced on December 22, 1847, § 11 read:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants to search any place or seize any person or thing shall issue without describing, as near as may be, nor

> without probable cause, supported by oath or affirmation.

Journal and Debates of the 1847-48 Constitutional Convention, reprinted in State Historical Society of Wisconsin, *The Attainment of Statehood* 228 (M. Quaife ed. 1928).

On January 22, 1848, the committee on revision and arrangement suggested several changes in the declaration of rights. *Id.* at 713-16. Among other things, the committee redrafted art. I, § 11 to track the language of the Fourth Amendment. *Id.* at 714. The change was made to use words "that conveyed the meaning most fully and as were most generally used in constitutional law." *Id.* at 715. After the changes, art. I, § 11 provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

By selecting words that "were most generally used in constitutional law" and that were virtually identical to the Fourth Amendment, the drafters showed an intent to conform the meaning of Wisconsin's search and seizure provision to the Fourth Amendment and an intent that art. I, § 11 provide the same protection as the Fourth Amendment.

Other courts adopting the *Hodari* test for their state constitutions have also noted that their state constitutions do not provide for greater protection than that afforded by the Fourth Amendment. *Henderson*, 597 A.2d at 488; *Cronin*, 509 N.W.2d at 676; *Johnson*, 912 S.W.2d at 233-34.

The fact that art. I, § 11 affords the same protection as the Fourth Amendment provides the strongest reason

for having the same test for a seizure of a person under the Wisconsin Constitution as under the Fourth Amendment.

5. Policies promoted by *Hodari* are the same as those promoted in *Hobson*.

    a. *Hodari* and *Hobson* promote complying with police orders and using the legal process to challenge the lawfulness of the police conduct.

As a policy matter, the Supreme Court believed that its test for seizure of a person in *Hodari* encouraged compliance with police orders to stop, which was desirable because street pursuits always place the public at some risk. *Hodari*, 499 U.S. at 627. The Court discouraged citizens from engaging in self-help and fleeing if they thought the police action was unlawful. The Court said: "Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply." *Hodari*, 499 U.S. at 627.

The Court's test for seizure does not leave the citizen without remedy for unlawful police conduct. The Court explained that, because the police expect that the citizen will comply with an order to stop, unlawful police conduct can be deterred by applying the exclusionary rule to the successful seizures: "Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed. Since policemen do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures." *Hodari*, 499 U.S. at 627.

The policies promoted in *Hodari* are the same as the polices cited by this court in *Hobson* as the reasons for abrogating the common law privilege to resist an unlawful arrest in the absence of unreasonable force. The court acknowledged that resisting arrest was highly likely to result in injury and was a blow for attempted anarchy, not a blow for liberty. *Hobson*, 218 Wis. 2d at 373. The concern for safety expressed in *Hobson* is similar to the observation in *Hodari*, 499 U.S. at 627, that street pursuits place the public at some risk.

In *Hobson*, 218 Wis. 2d at 375-76, the court said that citizens did not have to protect themselves against unlawful arrest as they did in the past because there are now many safeguards and opportunities for redress, including the exclusionary rule and civil remedies and injunctions. By abrogating the common law privilege to resist unlawful arrest, the court discouraged self-help that could lead to violence and encouraged citizens to seek redress through the legal process. *Hobson*, 218 Wis. 2d at 379-80. In *Hodari*, 499 U.S. at 627, also, by delaying Fourth Amendment protection for citizens until they submit to a show of authority, the Court encouraged citizens to comply with police orders and to seek redress against unlawful police conduct through the legal process, including the exclusionary rule.

The courts in *Agundis*, 903 P.2d at 758, and in *Johnson*, 864 S.W.2d at 723, recognized that the *Hodari* test for seizure encourages compliance with police orders. The fact that other Texas laws also encouraged compliance with police orders was a reason given by the Texas courts for adopting the *Hodari* test under the Texas Constitution. *Johnson*, 912 S.W.2d at 235; *Johnson*, 864 S.W.2d at 722-23.

The Texas Court of Appeals pointed out that to reject the *Hodari* rule would 'encourage suspects to flee from the police, a practice that endangers the fleeing suspect, the pursuing officer, and the general public." *Johnson*, 864 S.W.2d at 722. The Texas court was correct because, if

the suspect is considered seized as soon as the officer says "stop," the guilty suspect is encouraged to flee in order to avoid capture and the possible discovery of contraband or evidence on his person. If he succeeds in fleeing from the police, he avoids the police finding the evidence. If the police pursue and catch the suspect, the cost to him is little. If the officer did not have reasonable suspicion when he ordered the person to stop, evidence discarded after the order or found on the person would be excluded. If the officer had reasonable suspicion when he ordered the person to stop, the person risks only an extra misdemeanor conviction for obstructing or resisting an officer; a risk that is worth taking if he thinks he can avoid being caught and arrested for a more serious offense.

The *Hodari* test encourages compliance because the suspect's actions between the show of authority and the eventual seizure can be used against him. As a result, he has less to gain from fleeing from the police. If the suspect believes he can flee successfully, the *Hodari* test will not deter him from trying. However, the law should not reward the person who flees from the police command and it should encourage compliance, for the reasons stated in *Hobson*.

The fact that the policies of the State of Wisconsin as reflected in *Hobson* are the same as the policies promoted in *Hodari* provides another reason for reaffirming the adoption of the *Hodari* test as the test for seizure under the Wisconsin Constitution.

b. Young's complaints about the *Hodari* test are resolved by complying with the police order and challenging the lawfulness of the order through the legal process.

(1) Young claims that *Hodari* does not deter unlawful police conduct.

Young argues that the *Hodari* test should be rejected for several reasons; but the problems raised by Young can be resolved if the suspect complies with the officer's order to stop and then challenges the lawfulness of the command through the legal process consistent with the polices promoted in *Hodari* and *Hobson*.

Young contends that the *Hodari* test should be rejected because it shifts the focus from the police conduct to the citizen's action. Brief of Defendant-Appellant-Petitioner at 17. Young claims that the focus should be on the police conduct to be consistent with the purpose of the exclusionary rule, which is to deter unreasonable searches and seizures. Brief of Defendant-Appellant-Petitioner at 17. Young argues that *Hodari* "marks a significant shift from the deterrent effect of the exclusionary rule and its focus on law enforcement's actions." Brief of Defendant-Appellant-Petitioner at 18. Young explains his theory by stating that, under *Hodari*, "the lawfulness of the police action is determined not by what the officer knew when he or she decided to seize an individual. Rather, ***Hodari D.*** instructs that the lawfulness of the police action can turn on the citizen's reaction to it." Brief of Defendant-Appellant-Petitioner at 18. Young states that tainted evidence will be suppressed if the citizen submits to an unlawful seizure, but if "a police officer decides to seize an individual without reasonable suspicion and that individual walks away, avoiding that police contact,

***Hodari D.*** converts an unlawful police action to a lawful one." Brief of Defendant-Appellant-Petitioner at 18.

Young's argument at page 18 and elsewhere in his brief contains errors that must be corrected before his main points can be addressed. Twice on page 18 and again on page 26 of his brief, Young claims that the lawfulness of the police officer's conduct is judged by what information was available to the officer when he or she made the decision to stop a citizen. Young is wrong. In determining whether the officer acted lawfully, courts do not question whether the officer had information establishing reasonable suspicion or probable cause when he or she decided to make a stop or an arrest. The stop or the arrest is lawful if the officer possessed the requisite degree of information "at the moment of the seizure." *Terry*, 392 U.S. at 21-22. What the officer thought when he decided to seize a suspect is irrelevant because the subjective intent of the officer is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted. *Chesternut*, 486 U.S. at 575 n.7; *State v. Kramar*, 149 Wis. 2d 767, 782, 440 N.W.2d 317 (1989). Because *Hodari* based the validity of the seizure on the information known to the officer when the seizure was made, it is consistent with and not a departure from the rule stated in *Terry* that the validity of the police conduct depends upon the information known to the officer at the moment of the seizure.

Young claims on pages 18, 19 and 25 of his brief that an officer's attempt to make an unlawful seizure can become a lawful seizure if the citizen walks away from the show of authority. Not surprisingly, Young provides no citation to support the statement that a citizen's walking away from police justifies a seizure. Young's error apparently rests on the failure to reconcile the decisions in *Royer* and *Wardlow*.

Discussing consensual encounters between officers and citizens, the Court said in *Royer*, 460 U.S. at 497, that

officers do not violate the Fourth Amendment by approaching citizens and asking them questions. The Court explained that the citizen approached "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Id.* at 498. The Court added that the citizen "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Id.*

In *Wardlow*, 528 U.S. at 124, the Court said that headlong flight at the sight of a police officer is the consummate act of evasion and, although not necessarily indicative of wrongdoing, it is "certainly suggestive of such." The Court concluded that the officer was justified in suspecting that Wardlow was involved in criminal activity and in detaining Wardlow based on Wardlow's flight at the sight of police officers in a high crime area of Chicago. *Id.*

The Court in *Wardlow*, 528 U.S. at 125, explained that its holding was consistent with the decision in *Royer*, 460 U.S. at 498, "where we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business." The Court in *Wardlow*, 528 U.S. at 125, also pointed out that it had previously said that refusal to cooperate, without more, does not furnish the justification for detention or seizure. The Court then explained:

> But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

*Wardlow*, 528 U.S. at 125.

The Court, thus, distinguished a citizen's unprovoked flight at the sight of police from a citizen's walking away from police to go about his business.

This case is about Young's unprovoked flight from the police; it is not about a citizen walking away from a police officer and continuing on his way when the officer tries to stop him. Several cases have recognized that walking away from police may not provide reasonable suspicion to stop someone in circumstances where headlong flight from the police will provide reasonable suspicion. *United States v. Franklin*, 323 F.3d 1298, 1302 (11th Cir. 2003) ("While any kind of flight, *even walking away*, might support a finding of reasonable suspicion, . . ., '[h]eadlong flight--wherever it occurs--is the consummate act of evasion.'"); *United States v. Valentine*, 232 F.3d 350, 357 (3rd Cir. 2000); *Jones*, 745 A.2d at 863 n.29 ("[T]the type of flight in *Wardlow*-running upon the sight of officers-may lead to a different inference about reasonable suspicion than merely turning and walking away from officers, as Jones did here."); *Hemsley v. United States*, 547 A.2d 132, 134 (D.C. 1988) (Distinguishing walking from running, the court said: "In contrast, an unhurried attempt to leave-a 'mere[ ] attempt[ ] to walk away'- implies no more than 'a desire not a talk to the police,' from which '[n]o adverse inference may be drawn.'").

In this case, the court of appeals expressed concern that *Hodari* rendered the right of the citizen to go his way under *Royer* "an empty right because it vests the police with the authority to pursue and detain anew. In short, the person is penalized for legal conduct while the police are rewarded for illegal conduct." *State v. Young*, 2004 WI App 227, ¶20, 277 Wis. 2d 715, 690 N.W.2d 866; Pet-Ap. 109.

The court of appeals, as well as Young, failed to account for the difference between walking away and headlong flight as it was explained in *Wardlow*. In this case, Young ran from the officer. The significance of

Young's headlong flight in determining whether the officer had reasonable suspicion before making the seizure will be discussed later in this brief in Argument II.B. For now it is sufficient to make it clear that headlong flight from the police is treated differently in search and seizure law from a citizen walking away from the police. Whether walking away contributes to reasonable suspicion or probable cause is not an issue in this case, which is only concerned with headlong flight from the officer prior to the seizure.

Young's main point in arguing that *Hodari* shifts the focus from police conduct to the citizen's action is that *Hodari* does not adequately deter unreasonable searches and seizures because under *Hodari* an officer may not have reasonable suspicion when he orders the citizen to stop; but, if the citizen does not submit to the order, the citizen's actions may provide reasonable suspicion to justify the later seizure when the citizen does submit or is physically contacted by the officer. Young believes that, because the eventual seizure is valid, the officer is not deterred from making the initial show of authority even when he does not have reasonable suspicion to justify a seizure. Brief of Defendant-Appellant-Petitioner at 17-19.

The Court in *Hodari* explained why Young is wrong. The Court said in *Hodari*, 499 U.S. at 627: "Since policemen do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures." In other words, when a police officer makes a show of authority, he expects that the citizen will submit. Because he expects the citizen to submit, the officer has incentive to delay shouting "stop" until he has reasonable suspicion because, if the citizen stops as expected and the officer does not have reasonable suspicion, the seizure is invalid and any evidence that is seized will be suppressed.

Young also complains that *Hodari* results in inconsistent treatment of the same police conduct by different officers because the lawfulness of the seizure can

be determined by whether the citizen immediately submits to an unlawful show of authority or the citizen runs away and renders the ultimate seizure lawful. Brief of Defendant-Appellant-Petitioner at 19. Young argues that police must know in advance whether their conduct will implicate the Fourth Amendment. Brief of Defendant-Appellant-Petitioner at 19.

*Hodari* does not pose the problem Young claims. Because the officer expects the citizen to submit to the show of authority, the officer under *Hodari* will have to assume that his show of authority will result in submission and a seizure and he will be encouraged to have reasonable suspicion before making the show of authority. The *Hodari* test promotes consistent application of the Fourth Amendment to similar police conduct from one incident to another by encouraging the citizen to immediately comply with the show of authority and then challenge the lawfulness of the seizure in court.

The policy in *Hodari* and in *Hobson* of encouraging compliance with police orders is consistent with the deterrent purpose of the exclusionary rule and with consistent application of the Fourth Amendment and art. I, § 11 to police conduct. *Hodari* and *Hobson* encourage the citizen to submit to the officer and to use the judicial process to challenge the validity of the officer's conduct. When the citizen submits to the show of authority, the police are pressured to have reasonable suspicion before making the show of authority or they risk having any evidence they find excluded from trial.

(2) Young claims *Hodari* does not protect citizens from police pursuits or attempted arrests.

Young argues that *Hodari* should be rejected because it does not grant constitutional protection to police

pursuits and attempted arrests. Brief of Defendant-Appellant-Petitioner at 19-20. Young cites no United States Supreme Court or Wisconsin Supreme Court decisions that provide constitutional protection to flights from police officers or unsuccessful attempts at seizures.

The United States Supreme Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 845 n.7 (1998), said that *Hodari* foreclosed the argument that the Fourth Amendment covers failed attempts to make a seizure. The Court said that: "Attempted seizures of a person are beyond the scope of the Fourth Amendment." *Id.*

Denying constitutional protection to flight from the police is consistent with the policy in *Hodari* and *Hobson* to encourage compliance with police commands.

To provide constitutional protection to flight and attempted seizures would encourage flight from the police, as pointed out in *Johnson*, 864 S.W.2d at 722.

Because Wisconsin's policy, as reflected in *Hobson*, is to encourage compliance with police orders and to challenge the validity of the police conduct through the legal process, this court should reaffirm the adoption of the *Hodari* test, which discourages flight from the police.

(3) Young claims *Hodari* eliminates meaningful judicial review.

Young argues that *Hodari* eliminates meaningful judicial review of police conduct because the police actions will not be subject to neutral judicial review if the citizen does not submit to the police authority. Brief of Defendant-Appellant-Petitioner at 20-21.

Again, *Hodari* and *Hobson* encourage compliance with police commands and encourage citizens to challenge the lawfulness of the resultant seizures through the legal

process. As long as the citizen complies with the police command, the citizen can challenge the lawfulness of the seizure and obtain the desired judicial review of the officer's conduct. *Hodari* does not eliminate meaningful judicial review. *Hodari* encourages the citizen to comply with the police order so that the meaningful review can be obtained without risking public safety by having the citizen engaging in a self-help remedy of flight.

c. Because *Hodari* is consistent with Wisconsin policies, the adoption of its test for seizure under the Wisconsin Constitution should be reaffirmed.

The decisions in *Hodari* and in *Hobson* encourage citizens to comply with police orders and to challenge the lawfulness of the orders through the legal process. As described above, Young's complaints about the *Hodari* test are resolved by the citizen complying with police orders and challenging the lawfulness of the order through the legal process. Because the policies promoted by *Hodari* are consistent with Wisconsin's policies as reflected in *Hobson,* this court should reaffirm its adoption of the *Hodari* test as the test for determining seizure of a person under art. I, § 11.

D. Reaffirmation of the adoption of the *Hodari* test in Wisconsin is consistent with the decisions in other states with constitutional texts and histories similar to Wisconsin's.

Other jurisdictions are split in deciding whether to adopt the *Hodari* test for seizure under their respective state constitutions. Young asks this court to join the states that have rejected the *Hodari* test. Brief of Defendant-Appellant-Petitioner at 21-26. The state requests this

court to reaffirm the adoption of the *Hodari* test for its state constitution as have the other states that have adopted the test.

In *Matos*, 672 A.2d at 775, the court pointed out that the decisions rejecting the *Hodari* test "clearly evidence a recognition by the courts that the citizens of their states are entitled to broader privacy rights under their state constitutions" and the "several states that have adopted *Hodari D.* do so noting that they do not have a history of providing greater protection to their citizens or recognizing a privacy interest."

Because this court said in *Fry*, 131 Wis. 2d at 172 and 174, that art. I, § 11 provides the same protections as the Fourth Amendment, this court should reaffirm its adoption of the *Hodari* standard in alliance with the other courts that have adopted that test for their state constitutions. In adopting the *Hodari* test for their state constitutions, the following courts noted that the text of their respective constitutional provisions corresponding to the Fourth Amendment were identical or nearly identical to the Fourth Amendment and they pointed out that their state constitutional provisions did not afford greater protection than the Fourth Amendment. *Henderson*, 597 A.2d at 488 (Md.); *Cronin*, 509 N.W.2d at 675-76 (Neb.); *Johnson*, 912 S.W.2d at 232-34 (Tex. Crim. App.). In *Agundis*, 903 P.2d at 756-57, where the text of Idaho's Constitution was nearly identical to the Fourth Amendment, the Idaho Court of Appeals adopted the *Hodari* standard even though the Idaho Supreme Court on other issues had twice interpreted the state constitution to provide greater protection than the Fourth Amendment.

Wisconsin should not join the following states that rejected the *Hodari* test since the constitutions in those states provide greater protection than the Fourth Amendment, which is contrary to this court's construction of art. I, § 11 of the Wisconsin Constitution as reported in *Fry*, 131 Wis. 2d at 172, 174: *State v. Oquendo*, 613 A.2d 1300, 1309 (Conn. 1992); *Jones*, 745 A.2d at 866 (Del.);

*State v. Quino*, 840 P.2d 358, 362 (Haw. 1992); *State v. Tucker*, 626 So.2d 707, 711-12 (La. 1993); *Commonwealth v. Stoute*, 665 N.E.2d 93, 96 n.10 (Mass. 1996); *State v. Clayton*, 45 P.3d 30, 34 (Mont. 2002); *State v. Beauchesne*, 868 A.2d 972, 980 (N.H. 2005); *People v. Bora*, 634 N.E.2d 168, 170 (N.Y. 1994); *Matos*, 672 A.2d at 775 (Pa.); *State v. (Kevin) Young*, 957 P.2d at 686 (Wash.). In *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999), the court did not give its reasons for declining to use the *Hodari* definition of seizure. In *State v. Randolph*, 74 S.W.3d 330, 337 (Tenn. 2002), the court rejected the *Hodari* standard because the court found that it was inconsistent with prior Tennessee decisions. In *Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993), the court rejected the *Hodari* test because it had experience in applying the *Mendenhall* test and because it viewed *Hodari* as a departure from the prior test. In *State v. Tucker*, 642 A.2d 401, 405 (N.J. 1994), the court rejected the *Hodari* test because the court said it was "too radical a change in our search-and-seizure law."

Young asks this court to follow *Tucker* and reject the *Hodari* test because it is too radical a change from the *Mendenhall* test that has been applied in Wisconsin in *State v. Williams*, 2002 WI 94, 255 Wis. 2d 1, 646 N.W.2d 834, *Kramar,* and *Stout.* Brief of Defendant-Appellant-Petitioner at 22-23.

This court should not reject the *Hodari* test just because the *Mendenhall* test was applied in those three cases. In *Stout*, 250 Wis. 2d 768, ¶¶19-20, the court simply agreed with the defendant that the *Hodari* test did not apply where the suspect submitted to the show of authority and did not flee from the officer. In *Kramar* and *Williams* the defendants did not flee. The situations in *Kramar* and in *Williams* were the same as the situations in *Mendenhall* and in *Royer.* In all the cases, the defendants answered the questions from the police or went with the police; and the issue was whether the defendants answered the questions or went with the police consensually or whether the defendants had been seized because a

reasonable innocent person would not have felt free to leave. As described in Argument I.B. above, all the cases are consistent with *Hodari* and present situations different from *Hodari* where the suspect fled from the police. Because there are no inconsistencies between *Hodari* and the Wisconsin cases of *Williams*, *Kramar* and *Stout*, the fact that the three Wisconsin cases applied the *Mendenhall* test to the issues in those cases does not provide a reason for rejecting the *Hodari* test in Wisconsin.

The *Hodari* test should not be rejected on the ground that it is a radical change from the *Mendenhall* test because the fact it was adopted in *Kelsey C.R.* and applied in *State v. Powers*, 2004 WI App 143, ¶8, 275 Wis. 2d 456, 685 N.W.2d 869, without any discussion of differences between the two tests shows that Wisconsin courts recognize that the two tests are consistent and just apply to different situations, as was pointed out in *Stout*.

Young concedes that this court in *Kelsey C.R.* adopted the *Hodari* standard as the test for seizure of a person under art. I, § 11 of the Wisconsin Constitution. Brief of Defendant-Appellant-Petitioner at 23-25. Young apparently argues that this court did not really mean to adopt *Hodari* because he points out that the *Kelsey C.R.* decision has been cited for its statement about the police department's community caretaker function. Brief of Defendant-Appellant-Petitioner at 24-25.

The fact that subsequent cases have cited the discussion of the community caretaker function in *Kelsey C.R.* does not diminish the fact that this court adopted the *Hodari* test for the Wisconsin Constitution in that case. Appellate decisions are frequently cited for more than one proposition of law without reducing the effect of any of the points covered in the decisions.

In *Kelsey C.R.*, 243 Wis. 2d 422, ¶¶29, 33, this court said it would "follow the *Hodari D.* standard for when a seizure occurs" under the Wisconsin Constitution as well as the Fourth Amendment. In this case, the court should

reaffirm the adoption of the *Hodari* test because the text of art. I, § 11 is virtually identical to the Fourth Amendment, because this court has consistently and routinely conformed the law of search and seizure under the Wisconsin Constitution to that developed by the United States Supreme Court under the Fourth Amendment, because art. I, § 11 and the Fourth Amendment are intended to protect the same interests, because *Hodari* and Wisconsin as reflected in the *Hobson* decision promote the same policies of encouraging citizens to comply with police officer commands and challenging unlawful police conduct through the legal process and because adoption of the *Hodari* test in Wisconsin is consistent with the decisions in states whose constitutional texts and protections are similar to Wisconsin's.

## II. PURSUANT TO THE *HODARI* TEST FOR SEIZURE, YOUNG WAS LEGALLY SEIZED WHEN OFFICER ALFREDSON GRABBED YOUNG AT THE PORCH OF THE HOUSE.

After determining the test for seizure of a person to be applied in Wisconsin, the court will have to decide whether Young was legally seized to determine whether the drugs were properly admitted into evidence. The state submits that Young was legally seized under either the *Hodari* or the *Mendenhall* test. The state will first discuss the seizure under the *Hodari* test. The moment of the seizure must be determined and, then, the issue of whether the officer had reasonable suspicion to support the stop at that moment must be determined.

A. Under the *Hodari* test, Young was seized when Officer Alfredson grabbed him at the porch of the house.

Young argues that even under *Hodari* he was momentarily seized before he ran from Officer Alfredson. Brief of Defendant-Appellant-Petitioner at 26-28. Young argues that Alfredson made a show of authority when he stopped his squad car in the road behind the car in which Young was a passenger, turned on his flashing lights and shined a spotlight into Young's car. Brief of Defendant-Appellant-Petitioner at 26. Young contends that no reasonable person would have felt free to leave in light of the show of authority. Brief of Defendant-Appellant-Petitioner at 27. Young claims he briefly submitted to the show of authority as evidenced by his momentary delay in getting out of his car after Alfredson made the show of authority. Brief of Defendant-Appellant-Petitioner at 27-28.

The record and the law do not support Young's claim that Alfredson made a show of authority when he parked his car, turned on his flashers and shined a spotlight into Young's car; and the record does not support Young's claim that he was even aware of the presence of the police car when he got out of his car let alone that he was aware of any facts that would constitute a show of authority.

Alfredson's actions are similar to those of the officers in *Clayton* where the court found that there was no seizure even under the *Mendenhall* test. In *Clayton*, 45 P.3d at 35, the officers pulled in behind Clayton's already parked car "and shined the spotlight to determine how many people were in the vehicle. The officers did not have their sirens or emergency lights on and the encounter took place on a public street." The court concluded there was no seizure under these circumstances. *Id.*

In this case, Alfredson stopped his marked patrol car in the roadway almost parallel with the car directly behind

Young's car (42:11; 45:8, 14, 61, 64; Pet-Ap. 118, 124). Alfredson illuminated Young's car with a spotlight (45:9, 63; Pet-Ap. 119). Because he was still in the roadway, Alfredson turned on his flashing lights (45:9, 63; Pet-Ap. 119). Alfredson explained: "I put my flashers on. They blink on the sides. They don't have the overhead emergency rollers going all the way" (45:64). Alfredson said he "had the flashers on. I didn't have the full emergency lights, just the flashers" (45:78).

When Alfredson said he did not have the emergency lights on, he was referring to the flashing red and blue lights that signal a car to stop. Pursuant to Wis. Stat. § 346.04(3), a driver must stop when he receives a visual or audible signal from a marked police vehicle. Pursuant to Wis. Stat. §§ 340.01(3)(a) and 346.03(3), a police vehicle, which qualifies as an emergency vehicle, is exempt from some rules of the road when the police vehicle gives a visual signal by means of a blue and a red flashing, oscillating or rotating lights. These statutes show that the blue and red flashing lights on a police car that are used to stop a vehicle are the emergency lights.

Michelle Johnson, who was in the car with Young, said the squad car did not have a siren turned on and she could not remember if it had on any light other than the spotlight (45:98, 102).

The important facts in *Clayton* are the same as the facts in *Young*. The officer parked behind the defendant's car, shined a spotlight into the defendant's car and did not have sirens or emergency lights on. Just as actions of the police were not sufficient to constitute a seizure in *Clayton*, they are not sufficient to constitute a show of authority for purposes of a seizure in this case.

*State v. (Kevin) Young*, 957 P.2d at 688-89, is another case where the court said that a police car shining a spotlight did not amount to a show of authority such that a reasonable person would have believed he or she was not free to leave.

In this case, the evidence was that everyone felt free to leave the car after Alfredson stopped, turned on his flashers and shined the spotlight into the car. Johnson said she and the others in the car got out right after Young got out (45:97-98, 102).

Therefore, there is no evidence that when he parked his squad car, turned on his flashers and shined his spotlight, Alfredson made a show of authority that would have made a reasonable person feel that he was not free to leave. Even under the *Mendenhall* test there could not have been a seizure, as the courts concluded in *Clayton* and in *Kevin Young*. There is also no evidence that, even if Alfredson made a show of authority, anyone in Young's car saw it. Johnson heard no siren and saw no light other than the spotlight. Based on what Johnson could remember seeing, there was no show of authority and no seizure.

Because there was no show of authority, there was nothing to which Young could have momentarily submitted before leaving the car. In addition, there is no evidence that Young submitted to anything for any period of time before Alfredson caught him on the porch. Johnson indicated that Young got out of the car after the police car stopped, but there is no evidence that Young was aware of the police car. A person cannot submit to a show of authority when he is not aware of it.

Thus, there is no evidence that Young was seized under either the *Mendenhall* or the *Hodari* test before he got out of the car.

Alfredson said that when Young got out of the car, he ordered Young back into the vehicle (45:9; 65; Pet-Ap. 119). Alfredson said the man disregarded him, turned and took two nonchalant steps like he did not hear Alfredson (45:9, 65; Pet-Ap. 119). Alfredson said he then yelled very loudly: "[S]top, get back in the vehicle" (45:9, 65; Pet-Ap. 119). After that, Young looked at Alfredson in uniform and ran toward the house with Alfredson in

pursuit (45:9, 61, 65, 79; Pet-Ap. 119). Young ran to the porch of a house, Alfredson caught up to him, grabbed him and they struggled until Alfredson gained control over Young (45:9-10; Pet-Ap. 119-20). During the struggle, Young had managed to slip out of his coat and to throw it into the doorway of the house (45:9-10; Pet-Ap. 119-20). After Young was arrested, Alfredson searched the coat and found a small glass container that contained THC (45:11-12; Pet-Ap. 121-22).

Alfredson made a show of authority when he yelled "[S]top, get back in the vehicle" (45:9, 65; Pet-Ap. 119). As explained in *Hodari*, 499 U.S. at 626, an officer yelling for someone to stop does not constitute a seizure. There is no seizure until the person submits to the show of authority. *Hodari*, 499 U.S. at 626; *Kelsey C.R.*, 243 Wis. 2d 422, ¶33.

Young did not submit to Alfredson's command to stop. Young ran to the porch of a house where Alfredson caught him, grabbed him and gained control over him. Pursuant to the test for seizure in *Hodari* and *Kelsey C.R.*, Young was seized when Alfredson caught him on the porch.

The seizure was lawful, because as will be discussed next, prior to the moment of seizure Alfredson had obtained information that provided reasonable suspicion to justify stopping Young.

### B. Because prior to the moment of seizure Alfredson had reasonable suspicion that Young was violating the law, the seizure was lawful.

Alfredson's seizure of Young was lawful as long as prior to the moment of seizure Alfredson had reasonable suspicion that Young had violated or was violating the law. *Terry*, 392 U.S. at 21-22; *Powers*, 275 Wis. 2d 456, ¶8; *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d

406, 659 N.W.2d 394; *Franklin*, 323 F.3d at 1301; *United States v. Santamaria-Hernandez*, 968 F.2d 980, 983 (9th Cir. 1992) ("The determination whether agents have founded suspicion to justify a stop may take into account all of the events that occur up to the time of physical apprehension of a suspect who flees.").

A police officer "may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Wardlow*, 528 U.S. at 123. To satisfy the reasonable suspicion standard, "the officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch"' of criminal activity." *Wardlow*, 528 U.S. at 123-24.

When discussing how reviewing courts should make reasonable-suspicion determinations, the Supreme Court has said that "they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Id.*

Nothing in the Fourth Amendment requires that a police officer's suspicions relate to particular criminal activity. *State v. Anderson*, 155 Wis. 2d 77, 86, 454 N.W.2d 763 (1990).

"[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Wardlow*, 528 U.S. at 125. The question is "[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience." *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

Several facts contributed to Alfredson having reasonable suspicion that Young was violating or had violated the law so that the stop of Young was lawful.

The stop occurred just before midnight (42:3; 45:5, 62; Pet-Ap. 115). The fact that the stop occurred late at night is properly considered as a factor in the totality of the circumstances equation. *State v. Morgan*, 197 Wis. 2d 200, 214, 539 N.W.2d 887 (1995); *State v. Allen*, 226 Wis. 2d 66, 74-75, 593 N.W.2d 504 (Ct. App. 1999).

Alfredson described the area in which Young was found as an area that had problems with fights, with drinking in cars[2] and drug use outside the nearby bars and taverns (42:4). Alfredson explained that it was a police priority to patrol the area because neighbors had complained about people leaving beer bottles in the yards, loud music and people being loud and boisterous going to and from the bars and taverns (45:5-6; Pet-Ap. 115-16). Alfredson said a lot of people who had been going in and out of the area had been loud, throwing beer bottles, drinking in cars and doing drugs (45:61-62).

The reputation of the area in which the stop occurs is another factor in the totality of the circumstances. *Wardlow*, 528 U.S. at 124; *Morgan*, 197 Wis. 2d at 211; *Allen*, 226 Wis. 2d at 74; *State v. (Charles D.) Young*, 212 Wis. 2d 417, 427, 569 N.W.2d 84 (Ct. App. 1997). In this case, the fact that Young was stopped in an area known for people drinking in cars and doing drugs was a factor contributing to reasonable suspicion.

The conduct of the people in the car, even though it was also consistent with innocent conduct, was another factor contributing to reasonable suspicion. At about 11:49 p.m., Alfredson drove down the street and noticed the car with Illinois plates that was occupied by about five people (45:7; Pet-Ap. 117). Alfredson noticed that the

[2]A person may be required to forfeit up to $100 if he drinks alcohol beverages while in a motor vehicle upon a highway. Wis. Stat. §§ 346.935(1) and 346.95(2m).

Illinois plates were not familiar to the area because you kind of know which cars belong to people who live there (45:13; Pet-Ap. 123). When Alfredson drove down the street again five or ten minutes later, the car was still parked with five people in it (45:8; Pet-Ap. 118). Alfredson said that, because between the two times he saw the car the occupants had time to park and go out somewhere, he was suspicious about drinking or narcotics (47:8; Pet-Ap. 118). Explaining why he decided to stop, Alfredson said: "Generally people don't sit in their car that long" (45:80).

Young argues that five people sitting in a car at night does not rise to a suspicion that criminal activity is afoot. Brief of Defendant-Appellant-Petitioner at 30. Relying on *State v. (Charles D.) Young*, 212 Wis. 2d at 428-33; *Hemsley*, 547 A.2d at 133-34; and *People v. Wilkins*, 231 Cal. Rptr. 1 (Calif. Ct. App. 1986), Young argues that, because five people sitting in a car is an ordinary, everyday occurrence, the fact does not contribute to reasonable suspicion. Brief of Defendant-Appellant-Petitioner at 31-32.

In *Allen*, 226 Wis. 2d at 74, the court pointed out that in *State v. (Charles D.) Young* the defendant had been observed engaging in conduct that was descried as "'an ordinary, everyday occurrence during daytime hours.'" The court distinguished the facts in *Allen* from those in *(Charles D.) Young* by pointing out that the conduct in *Allen* in hanging around in a residential neighborhood late at night, briefly entering into a car that stops and remaining in the neighborhood for five or ten more minutes was not an everyday occurrence. *Allen*, 226 Wis. 2d at 74.

In finding there was no reasonable suspicion, the court in *Hemsley*, 547 A.2d at 133, said that there were no facts about the defendant's conduct that was unusual.

In finding there was no reasonable suspicion, the court in *Wilkins* relied heavily on the decision in *People v.*

*Aldridge*, 674 P.2d 240 (Calif. 1984), where the court was reported to have observed that the defendant's conduct was not unusual. *Wilkins*, 231 Cal. Rptr. at 4-5.

The decisions in *(Charles D.) Young*, *Hemsley* and *Wilkins* are distinguishable from this case because the defendants in those cases were described as being engaged in conduct that was not unusual and that was an ordinary, everyday occurrence.

In this case, however, the conduct of the five people in the car was unusual. Conduct that is unusual can provide or help provide reasonable suspicion to justify a stop for further investigation. *See Brown v. Texas*, 443 U.S. 47, 52 (1979) (Court finds there was no reasonable suspicion where there was no indication that the defendant's conduct was unusual or that it was no different from the activity of other pedestrians in the neighborhood); and *Allen*, 226 Wis. 2d at 74 (court found reasonable suspicion where the defendant's conduct was not an everyday occurrence).

In this case, Alfredson's testimony showed that the conduct of the five people in the car was unusual and was not the kind of conduct that could be described as an everyday occurrence. Alfredson said that, because between the two times he saw the car the occupants had time to park and go out somewhere, he was suspicious about drinking or narcotics (45:8; Pet-Ap. 118). Explaining why he decided to top, Alfredson said: "Generally people don't sit in their car that long" (45:80). Alfredson's conclusion was consistent with the observation in *State v. Amos*, 220 Wis. 2d 793, 800, 584 N.W.2d 170 (Ct. App. 1998), that "[m]ost people simply park their cars in the lot and leave."

Based on his training and experience, Alfredson would know the general conduct of people in the neighborhood in the evening. Alfredson had patrolled in the same area for seven years (45:5; Pet-Ap. 115). He was familiar enough with the area that he could recognize the

cars that belonged to the people who lived in the area (45:13; Pet-Ap. 123). Based on his experience in the area, Alfredson was able to draw inferences from and make deductions about the information available to him that "'might well elude an untrained person.'" *Arvizu*, 534 U.S. at 273.

In *Anderson*, 155 Wis. 2d at 84, the court said: "*[I]f any reasonable inference of wrongful conduct can be objectively discerned*, notwithstanding the existence of other innocent inferences that could be drawn, *the officers have the right to temporarily detain the individual for the purpose of inquiry.*" (Emphasis added.)

Based on his knowledge of drinking in cars and drug use in the area and the knowledge that people don't usually sit in their cars as long as the five people sat in the car with the Illinois license plates, Alfredson could reasonably infer that one or more of the five people was engaged in wrongful conduct so that he had the right to temporarily detain the occupants of the car for the purpose of inquiry.

Therefore, Alfredson had reasonable suspicion to detain Young for the purpose of inquiry even when Alfredson ordered Young to stop and to return to the car. If there was any doubt that Alfredson had reasonable suspicion to stop Young based on the time, the area and the conduct of the people in the car, that doubt was erased when Young fled from Alfredson.

In *Wardlow*, 528 U.S. at 124-25, the Supreme Court held that unprovoked, headlong flight from the police can contribute to reasonable suspicion. In *Wardlow*, 528 U.S. at 124-25, the court concluded there was reasonable suspicion to stop the suspect based on two factors: he had fled from the police in a high crime area. In *Anderson*, 155 Wis. 2d at 79, 84, 87, this court concluded that flight alone from a police officer provided reasonable suspicion to justify stopping the person.

In *Franklin*, 323 F.3d at 1302, the court explained that, in determining whether flight is unprovoked, the court asks whether "a reasonable and innocent person facing this situation would have been caused to flee in the same manner as" the defendant. The court applied a similar test in *Marshall ex rel. Gossens v. Teske*, 284 F.3d 765, 771 (7th Cir. 2002), when it said Marshall's flight from plainclothes officers executing a search warrant was not unprovoked because "Marshall did what any sane person would do if he saw masked men with guns running toward him: he ran like hell."

When a police officer orders a reasonable, innocent person to stop, the person will stop or possibly walk away; but the reasonable, innocent person will not run from the police. Therefore, because Young fled from Alfredson after being ordered to stop, Young's flight was unprovoked.

Even if Alfredson did not have reasonable suspicion to support a stop when he ordered Young to stop, Young's flight from Alfredson can contribute to the reasonable suspicion Alfredson had when he eventually seized Young at the porch. *Watkins v. City of Southfield*, 221 F.3d 883, 885-89 (6th Cir. 2000); *Santamaria-Hernandez*, 968 F.2d at 982-84; *People v. Thomas*, 759 N.E.2d 899, 901-05 (Ill. 2001); *People v. Thomas*, 734 N.E.2d 1015, 1016-23 (Ill. App. Ct. 2000); *State v. Belcher*, 725 N.E.2d 92, 93-95 (Ind. Ct. App. 2000). *See also United States v. Martin*, 399 F.3d 750 (6th Cir. 2005) (this case did not involve flight from an officer, but the court said that in determining reasonable suspicion it can consider all evidence obtained before the seizure, even if the show of authority had been unlawful); and *United States v. Johnson*, 212 F.3d 1313, 1316-17 (D.C. Cir. 2000) (defendant's actions after unlawful show of authority helped provide reasonable suspicion to justify the eventual seizure).

Based on the time of the seizure, the reputation of the area in which the seizure occurred, the suspicious conduct

of the people in the car and Young's flight from him, by the time he seized Young, Alfredson had reasonable suspicion to believe that Young was violating or had violated the law so that the seizure was justified.

Young tries to distinguish his case from *Hodari* on the ground that Hodari threw away the drugs before the officer caught him and Young threw away the jacket with the drugs after Alfredson caught him and after the struggle had started. Brief of Defendant-Appellant-Petitioner at 28.

In terms of when the drugs were cast away relative to the seizure this case differs factually from *Hodari*. However, the sequence of legal events is the same. In *Hodari*, the officer's chase constituted the show of authority (*Hodari*, 499 U.S. at 629), Hodari's throwing away the rock of cocaine provided the reasonable suspicion for the stop (*Hodari*, 499 U.S. at 624), and the tackle of Hodari was the seizure (*Hodari*, 499 U.S. at 629). In this case, Alfredson's command to Young to stop and return to the car was the show of authority. The reasonable suspicion was provided by the time of the seizure, the area in which the seizure occurred, the conduct of the occupants of the car and Young's flight from Alfredson. Young was seized when Alfredson caught him at the porch. Thus, as in *Hodari*, in this case the officer had reasonable suspicion before seizing Young. As a result, the stop of Young was lawful and the trial court correctly denied the motion to suppress the drugs found in Young's jacket.

## III. PURSUANT TO THE *MENDENHALL* TEST FOR SEIZURE, YOUNG WAS LEGALLY SEIZED WHEN OFFICER ALFREDSON ORDERED HIM TO STOP AND RETURN TO THE CAR.

### A. Under the *Mendenhall* test, Young was seized when Officer Alfredson ordered him to stop and return to the car.

Pursuant to the *Mendenhall* test, a person is seized or detained "within the meaning of the Fourth Amendment, 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' *Mendenhall*, *supra*, 446 U.S. at 554, 100 S.Ct., at 1877 (footnote omitted)." *Delgado*, 466 U.S. at 215. The crucial test is whether "the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' *Chesternut*, *supra*, [486 U.S.] at 569." *Florida v. Bostick*, 501 U.S. 429, 437 (1991).

In this case, Alfredson's conduct did not communicate to a reasonable person that he was not free to leave until Alfredson ordered Young to stop and return to the car. As explained at from line 21 on page 35 to line 40 on page 37 of this brief, Alfredson did not make a show of authority when he stopped his car, turned on the flashers and shined the spotlight into Young's car. There was no show of authority at that point because Alfredson had not turned on the emergency lights of his car that would signal a driver to stop. Therefore, even if the *Mendenhall* test were applied in this case, Young would not have been seized before Alfredson ordered him to stop and return to the car.

For purposes of this appeal, it does not make a difference under the *Mendenhall* test whether Young was considered seized when the officer stopped the squad car and turned on the lights or when the officer ordered

Young to stop since Alfredson did not learn anything new between stopping the squad car and ordering Young to stop. However, for the sake of accuracy, the state contends that, under *Mendenhall*, Young would not have been seized before Alfredson ordered him to stop.

### B. Because prior to the moment of seizure Alfredson had reasonable suspicion that Young was violating the law, a seizure under the *Mendenhall* test was lawful.

Even under the *Mendenhall* test, a seizure of Young when Alfredson ordered him to stop would have been lawful because by that time Alfredson had reasonable suspicion to believe that Young had been or was violating the law.

As described at from line 5 on page 40 to line 26 on page 43 of this brief, Alfredson had reasonable suspicion based on the time of night that the seizure occurred, the area in which it occurred and the suspicious conduct of the occupants of the car prior to Alfredson stopping his car.

## IV. BECAUSE OFFICER ALFREDSON HAD REASONABLE SUSPICION TO STOP YOUNG WHEN HE ORDERED YOUNG TO STOP AND RETURN TO THE CAR, THERE WAS SUFFICIENT EVIDENCE TO CONVICT YOUNG FOR OBSTRUCTING AN OFFICER.

### A. Young waived his challenge to the sufficiency of the evidence for the obstruction conviction.

Young argues in this court that the evidence was not sufficient to support the conviction for obstruction because Officer Alfredson lacked reasonable suspicion to

justify a detention when he ordered Young to stop and return to the car.

Young never raised this issue in the court of appeals. Because Young did not raise the issue in the court of appeals, the issue should be deemed waived and not considered by this court. *Neely v. State*, 97 Wis. 2d 38, 55, 292 N.W.2d 859 (1980) (defendant's argument deemed waived because it was not presented to the court of appeals).

### B. The evidence was sufficient to support Young's conviction for obstructing.

If the court reaches the merits of Young's argument, the court should find that the evidence was sufficient to support Young's conviction for obstructing.

Young argues that the evidence was insufficient because the state did not prove that Officer Alfredson was acting with lawful authority when he ordered Young to stop and return to the car. Brief of Defendant-Appellant-Petitioner at 33-35. Young claims that Alfredson was not acting with lawful authority because, when he ordered Young to stop, Alfredson did not have reasonable suspicion to justify the stop he was ordering. Brief of Defendant-Appellant-Petitioner at 35.

As described from line 5 on page 40 to line 26 on page 43 of this brief, when Alfredson ordered Young to stop and return to the car, Alfredson had reasonable suspicion based on the time of night that the seizure occurred, the area in which it occurred and the suspicious conduct of the occupants of the car prior to Alfredson stopping his car. Because Alfredson had reasonable suspicion to stop Young, the evidence was sufficient to support the conviction for obstructing.

## CONCLUSION

For the reasons discussed above, the State of Wisconsin requests this court to affirm the decision of the court of appeals that affirmed the judgments of conviction.

Dated this 2nd day of May, 2005.

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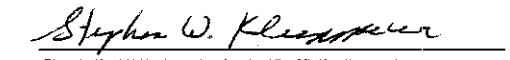
## CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 14,588 words.



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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2003AP002968-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES E. YOUNG,

Defendant-Appellant-Petitioner.

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ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN KENOSHA COUNTY, THE HONORABLE MICHAEL S. FISHER, PRESIDING

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# REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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# REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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## ARGUMENT

### I. THIS COURT SHOULD REJECT THE *HODARI* TEST FOR DETERMINING WHEN AND WHETHER A SEIZURE HAS OCCURRED.

The state argues that textual, historical and policy reasons dictate that this court should follow the Supreme Court's holding in ***California v. Hodari D.***, 499 U.S. 621

(1991) (state's brief at 14). Petitioner Young concedes that the texts of the Fourth Amendment to the United States Constitution and Article I, §11 of the Wisconsin Constitution are virtually identical. Young also concedes that this court has traditionally conformed its search and seizure jurisprudence to that of the Supreme Court (see brief-in-chief at 10, citing ***State v. Eason***, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 208).

Nevertheless, this court has made it clear that the federal right to be protected from unreasonable search and seizure need not be interpreted exactly the same as the right under the Wisconsin Constitution to be free from unreasonable search and seizure. This court has never abdicated its responsibility to interpret the reach of the Wisconsin Constitution. As the court said in ***State v. Tompkins***, 144 Wis. 2d 116, 135, 423 N.W.2d 823 (1988), this court will not hesitate to speak if the Supreme Court's interpretation of the Fourth Amendment undermines a Wisconsin citizen's right to be free from unreasonable searches and seizures:

> ...[T]his court will continue to construe our state constitutional search and seizure provision consistent with federal law interpreting the fourth amendment until and unless the federal protections offered undermine the rights protected under art. I, sec. 11.

***Id.***

Indeed, this court is duty-bound to interpret the Wisconsin Constitution. Even if this court decides that the Supreme Court interpretation of the Fourth Amendment is persuasive and should be followed, it is not a matter of relinquishing the responsibility for construing state law. The responsibility to construe state law is exclusively reserved to this court.[1]

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[1] As the dissent in ***Johnson v. State*** wrote:

Charles Young's case presents the question of whether the United States Supreme Court's interpretation of the Fourth Amendment in ***Hodari*** undermines the rights protected under Article I, Section 11 of the Wisconsin Constitution such that this court will decline to follow the holding in ***Hodari.***

The state argues that policy reasons warrant following ***Hodari.*** The state points in particular to encouraging compliance with police orders (state's brief at 20). The state argues that encouraging compliance with police orders, whether those orders are lawful or unlawful, is consistent with this court's holding in ***State v. Hobson***, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), which abrogated the right to forcibly resist unlawful arrest.

The state's argument first forces one to ask whether the holding in ***Hodari*** indeed promotes compliance with an officer's command. Commentators

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> Indeed, we are duty bound to interpret our state constitution independently from Supreme Court interpretation of federal analogs. We have no choice. The Supreme Court has no authority to interpret the Texas Constitution for us. Even if we find the federal example persuasive, and adopt it as our own, it is still this Court that construes Article I, §9. Moreover, we do not "diverge" from Supreme Court precedent on those occasions when we choose not to follow its interpretation of the Fourth Amendment in construing our own Article I., §9. We simply "follow our own lights," as is our exclusive prerogative.....Whether we interpret it differently or not, we cannot avoid independently construing Article I, §9.

***Johnson v. State***, 912 S.W.2d 227, 238 (Texas 1995).

disagree on whether the Court's holding will encourage or discourage compliance. LaFave writes:

> Conferring upon the police unfettered discretion to commence chases hardly seems likely to reduce the willingness of or the occasions on which members of the public would seek to elude the police.

LaFave, Search and Seizure, Vol. 4, §9.4(d), at 461 (4th Ed.).

Indeed, LaFave suggests that the ***Hodari*** holding will increase the possibility of dangerous police-citizen encounters rather than decrease them. This is because "the range of police conduct placed beyond Fourth Amendment restraints in ***Hodari*** is substantial and often of itself dangerous," whether that conduct is turning on sirens, drawing weapons or firing a warning shot. ***Id.***

More important than this question of encouraging compliance, however, is the question of what ***Hodari*** does to the balance of the individual and the government. The holding in ***Hodari*** may or may not encourage compliance with a police order to halt. The holding of ***Hodari*** will, however, give police an incentive to make a show of unlawful authority in the hopes that the subject will run, thus rendering any seizure lawful. LaFave writes:

> ...The holding in *Hodari D.*, if carried to its logical conclusion, "will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering whatever privacy rights they may still have." Once the police learn of the significance of *Hodari D.*, the temptation will certainly be there, for example in the instance of a

> mere "hunch" of drug activity, to utilize a very threatening chase as an evidence-gathering technique.

***Id.*** (footnotes omitted). [2]

Further, the public policy of encouraging compliance with the police is at odds with the purpose of the Fourth Amendment and Article I, §11 of the Wisconsin Constitution. The purpose of both provisions is to limit the powers of the government. *See* ***Tompkins***, 144 Wis. 2d at 133-36. Neither is a tool to assist the government in obtaining the cooperation of the citizen. As the dissent in ***Johnson*** put it:

> Finally, it is odd that the plurality would choose to interpret a constitutional provision manifestly designed to protect the individual from undue encroachment by the state according to the dictates of a so-called public policy that unequivocally elevates the exigencies of the state over the interests of the individual.

***Johnson***, 912 S.W.2d at 239.

The state's reliance on ***Hobson*** in promoting the theory of peaceful submission to police authority is also inapposite because ***Hobson*** involved the common-law right to ***forcibly*** resist unlawful arrest, and not the statutory offense of obstructing an officer. ***Hobson***, 218 Wis. 2d at ¶ 2. ***Hobson*** is not about compliance, or even about obstructing an officer. It is about forcibly resisting unlawful arrest. In ***Hobson***, the trial court dismissed the obstructing charge, and the state did not even appeal that

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[2] In the recently-decided obstructing case, ***State v. Reed***, 2005 WI 53, ___ Wis. 2d, ___ N.W.2d ___, Justice Prosser observed in his concurrence that court decisions can change the behavior of law enforcement even when they do not change the behavior of "people who have something to hide." Slip op. at ¶ 76. "Law enforcement officers may try harder to pose questions that will incriminate suspects if they are answered truthfully, or subject them to additional charges if they are denied." Id. at ¶ 77.

ruling. ***Id.*** at ¶ 10. The state appealed only from the dismissal of the battery to a police officer count. ***Id.***

In this case, Young does not challenge his conviction for resisting an officer. Young concedes that the struggle on the porch constituted resisting. If this court holds that ***Hodari*** is not the law in Wisconsin, Young will still be guilty of resisting arrest under ***Hobson***.

## II. CHARLES YOUNG WAS SEIZED UPON THE POLICE SHOW OF AUTHORITY: WHEN THE POLICE OFFICER STOPPED THE SQUAD CAR IN THE STREET, PUT ON HIS FLASHING LIGHTS, AND ILLUMINATED THE SPOTLIGHT ON THE CAR.

Charles Young's position is that he was seized when the police officer turned on his flashers and shined a spotlight into the car in which Young was a passenger. In its brief, the state takes issue with Young's reference to a police officer's *decision* to make a seizure (state's brief at 24). Young's position here does not turn on when Officer Alfredson made the decision to seize Young. The significant moment is when the officer took the affirmative steps to seize Young: turning on his flashers and illuminating the car with a spotlight. Once the officer took these affirmative steps, Young was seized pursuant to ***United States v. Mendenhall***, 446 U.S. 544 (1980).

The state asserts that ***Hodari*** was the first case in which the Supreme Court had to address the issue of whether an "uncomplied-with show of authority" constitutes a seizure (state's brief at 6, citing ***Johnson v. State***, 864 S.W.2d 708, 721[3]). A review of the facts in

[3] The court's opinion in ***Johnson***, was later withdrawn and a new opinion delivered by the court in ***Johnson v. State***, 912 S.W.2d 227 (1995). ***Id.*** at 229.

***Hodari***, however, shows this to be incorrect. If there was a show of authority in ***Hodari,*** it was minimal indeed, and it was far less significant than in this case.

In ***Hodari***, the police were on patrol in an unmarked car. ***Hodari***, 499 U.S. at 622. It was "late" in the evening. ***Id.*** The unmarked police car rounded a corner and the officers "saw four or five youths huddled around a small red car parked at the curb." ***Id.*** "When the youths saw the officers' car approaching they apparently panicked, and took flight." The youths ran off in different directions. "The officers were suspicious and gave chase." ***Id.*** at 623.

By contrast, here, Officer Alfredson drove a marked squad car (42:3). When he made his first pass by the car, no one fled. When he returned, seeing the car, still no one fled. Unlike ***Hodari***, where the youths fled at the sight of the unmarked police car, here, the youths did not flee from the sight of the marked squad car. Further, unlike ***Hodari***, here the police officer made a significant show of authority, illuminating his flashers and shining a spotlight into the car.[4]

The state argues that the officer did not make a "show of authority" when he parked his car, turned on his flashers, and shined a spotlight into the car (state's brief at 35.) It argues that the record does not even show that Young was aware of the presence of the police. *Id.* The state's argument that ***Hodari*** was the first case of an "uncomplied-with show of authority" cannot be reconciled, however, with its argument that there was no show of authority in this case. A simple comparison of the facts between ***Hodari*** and this case establishes that if

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[4] See also ***State v. Groomes***, 232 Conn. 455, 656 A.2d 646 (Conn. 1995). In ***Groomes***, the court found it significant that the suspect began to flee before the police attempted to stop him. ***Id.*** at 471. Thus, it is important in the sequence of events when the show of authority is made as compared to the citizen's actions.

the appearance of an unmarked squad car in ***Hodari*** constituted a show of authority, then certainly the actions taken by the officer in this case constituted a show of authority.

Indeed, a comparison of ***Hodari*** and this case establishes at least three important differences. In ***Hodari***, there was no discernible show of authority while here, the show of authority by the police was significant. In ***Hodari***, there was headlong flight at the first sight of the police. Here, Young did not flee at the first pass of the police car. Nor did he flee "headlong" as the state suggests. In the words of the police officer, Young got out of the car, and the officer ordered him to get back in. "He turned and started walking away from the vehicle" (45:9). The officer yelled at him again and started toward Young. At that point, Young turned and looked at the officer and started running (45:9). And finally, in ***Hodari***, the fleeing suspect discarded the contraband before the police laid hands on him, while here, no contraband was discovered until the police restrained Young on the porch.

## III. YOUNG HAD THE RIGHT TO WALK AWAY FROM OFFICER ALFREDSON UNDER *ROYER*.

Young's position is that Officer Alfredson did not have reasonable suspicion to believe crime was afoot, and further, pursuant to ***Florida v. Royer***, 460 U.S. 491 (1983), he had a right to ignore the officer and walk away, choosing not to answer any questions the officer might pose. Although the state argues that this court should conclude ***Hodari*** is the rule pursuant to the Wisconsin Constitution, the state ultimately seems to argue that this is really a flight case like ***Illinois v. Wardlow***, 528 U.S. 119 (state's brief at 26: "This case is about Young's unprovoked flight from the police...").

In ***Wardlow***, police were patrolling an area known for heavy narcotics trafficking. ***Id.*** at 121. An officer saw Wardlow in the area, holding an opaque bag. ***Id.*** Wardlow looked in the direction of the police and fled, running through a "gangway and an alley." ***Id.*** at 122. The Court concluded that Wardlow's presence in a high-crime neighborhood, holding a bag, coupled with flight upon noticing the police, constituted a sufficient basis for a ***Terry*** stop. ***Id.*** at 124.

This case is not controlled by ***Wardlow*** for several reasons. The neighborhood in ***Wardlow*** was well-known as an area of narcotics trafficking. The area in Young's case was known as an area where there were bars and complaints about noise and littering. To characterize the neighborhood as "high-crime" is not supported by the record.

In addition, Young did not flee headlong as did ***Wardlow***. Young disputes the state's characterization of the record that "in this case, Young ran from the officer" (state's brief at 26). Young did not immediately run from Officer Alfredson. He did not run or walk away after Alfredson first passed the car on patrol. The officer testified that he saw Young open the car door and begin to walk away. He did not flee when Alfredson illuminated the car. He did not begin to run until later in the encounter.

The court of appeals acknowledged that here, Young did not run until after the officer ordered him back into the car, but dismissed the factual difference as inconsequential (slip op. at ¶ 17; App. 108). A close examination of the particular facts is crucial in this inquiry, however. Pursuant to ***Royer***, and as acknowledged in ***Wardlow***, a citizen has the right to walk away from the police. The same citizen, it appears, cannot run away or the act of running away will be considered suspicious. A court must, therefore, judge whether a citizen's actions constitute a lawful walking

away or flight, just as it must judge whether the police officer had reasonable suspicion to warrant a seizure in a particular case.

Unlike the court of appeals, the state does distinguish in its brief between the citizen who flees versus the citizen who walks away from the police (state's brief at 26). One case the state cites, however, is supportive of Young's position. In ***United States v. Franklin,*** 323 F.3d 1298, 1302 (11th Cir. 2003), the court described the suspect's flight as particularly suspicious "because of its nature and duration." The court continued:

> He ran away at full speed as soon as he saw the officers. *He did not turn and start to walk away.* He did not act like he was going about his business. Instead he took off in "headlong flight."

***Id.*** (emphasis added).

Unlike Franklin, Young did turn and start to walk away; he did not take off in headlong flight.

In arguing that Young fled from Officer Alfredson, the state asserts that when a police officer orders a "reasonable, innocent person to stop, the person will stop or possibly walk away; but the reasonable, innocent person will not run from the police" (state's brief at 44). This argument is refuted by the Amicus Curiae brief filed by the NAACP Legal Defense and Education Fund in ***Wardlow***. The brief repeats an unhappy refrain backed up by study and survey, and that is that many law-abiding minority citizens, particularly in high-crime neighborhoods, flee at the sight of the police. And they flee not out of guilt, but out of fear:

> As documented herein, the incidence of police harassment, mistreatment, and even physical abuse of law-abiding minority citizens is sufficiently high

> that a desire to avoid police contact is no longer a reliable indicator that criminality is afoot.

NAACP Amicus Brief at 4.

This court should reject the state's unsupported claim that a reasonable, innocent person would not flee from the police.

## IV. CHARLES YOUNG'S CONVICTION FOR OBSTRUCTING MUST BE VACATED.

The state argues that Young waived his claim that the evidence was insufficient to support his conviction for obstructing an officer. Young concedes that he did not raise the issue to the court of appeals. The court of appeals raised the issue itself. This court has said, however, that sufficiency of the evidence claims need not be raised in the trial court before pursuing the issue on appeal. ***State v. Hayes***, 2004 WI 80, ¶ 54, 273 Wis. 2d 1, 681 N.W.2d 203. Although the sufficiency claim in ***Hayes*** was before the court of appeals, the same reasons for reaching the issue in ***Hayes*** support reaching the sufficiency of the evidence in this case.

Further, although issues which have been waived are not reviewable as of right, this court may consider such issues if it chooses. ***State v. Cleveland***, 118 Wis. 2d 615, 632, 348 N.W.2d 512 (1984). This court should reach the sufficiency of the evidence issue because the court of appeals raised it and because the sufficiency of the evidence turns on the primary issue presented in this case: whether the police conduct in this case violated Young's right to be free from unreasonable search and seizure under the federal and state constitutions. And for the reasons argued above and in his brief-in-chief, Young contends that Officer Alfredson did not have lawful

authority to seize him, and as a result, he cannot be guilty of obstructing.[5]

## CONCLUSION

For the reasons above and in his brief-in-chief, Charles Young respectfully requests that the court reverse the decision to deny his motion to suppress, and vacate his conviction for obstructing an officer.

Date this 16th day of May, 2005.

Respectfully submitted,

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[5] As noted above, Young does not challenge his conviction for resisting an officer.

# CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,995 words.

Dated this 12th day of May, 2005.

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